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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION

Civil Action No. 586

STATE OF MONTANA, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA AND PAUL T. SMITH, LEONARD C. YOUNG AND AUSTIN B. MIDDLETON, AS MEMBERS OF AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, *Plaintiffs,*

and

AMERICAN CRYSTAL SUGAR COMPANY, THE GREAT WESTERN SUGAR COMPANY AND HOLLY SUGAR CORPORATION, THE MONTANA STOCKGROWERS ASSOCIATION, A CORPORATION, AND THE MONTANA WOOLGROWERS ASSOCIATION, A VOLUNTARY ASSOCIATION, *Intervening Plaintiffs,*

vs.

UNITED STATES OF AMERICA, *Defendant,*

and

INTERSTATE COMMERCE COMMISSION, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY AND CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Intervening Defendants*

STATEMENT AS TO JURISDICTION ON BEHALF OF INTERVENING RAILROAD COMPANIES, DEFENDANTS-APPELLANTS

In compliance with Rule 12, as amended, of the Rules of the Supreme Court of the United States, defendants-appellants Northern Pacific Railway Company, Great

Northern Railway Company, Chicago, Burlington & Quincy Railroad Company, Union Pacific Railroad Company, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment and decree of the district court entered in this cause on August 13, 1952. A petition for appeal by these defendants-appellants was filed on October 9, 1952, and is presented to the district court herewith.

Opinions Below

The report of the Interstate Commerce Commission is found at 284 I. C. C. 167. The two opinions of the United States District Court for the District of Montana, Helena Division, the first filed July 24, 1952, the second on August 13, 1952, are not yet reported. Copies of these documents are attached.

Jurisdiction

The judgment of the specially-constituted, three-judge district court, setting aside the order of the Interstate Commerce Commission, was entered on August 13, 1952. A petition for appeal is presented herewith on October 9, 1952. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *Georgia Comm.* v. *United States,* 283 U. S. 765; *United States* v. *Louisiana,* 290 U. S. 70; *Florida* v. *United States,* 292 U. S. 1; *New York* v. *United States,* 342 U. S. 882.

Statement

These defendants-appellants are common carrier railroads operating within, to, from, and through the State of

Montana, engaged in both interstate and intrastate transportation.

During the years 1946 to 1949, inclusive, in three successive proceedings, the Interstate Commerce Commission, herein called the Commission, authorized throughout the United States certain permanent or continuing general increases in interstate railroad freight rates. The increases were to meet successively mounting railroad operating expenses. These proceedings were designated, respectively, as *Ex Parte 162, Ex Parte 166, and Ex Parte 168.*

The common carrier railroads operating in Montana petitioned the Board of Railroad Commissioners for permission to make corresponding increases in their Montana intrastate freight rates. The Board authorized increases in intrastate rates corresponding, with certain exceptions, to those authorized on interstate traffic in *Ex Parte 162* and *Ex Parte 166* and refused to grant increases corresponding to those authorized on interstate traffic in *Ex Parte 168.*

Thereafter, on petition of said Montana railroad, after hearing, and acting under Section 13 (4) of the Interstate Commerce Act, the Commission made findings, upon which it concluded: (1) that the Montana intrastate rail freight rates caused, and in the future would cause, unjust discrimination against interstate commerce, and (2) that such intrastate rates also caused, and would cause, undue preference of certain persons and localities in intrastate commerce, on the one hand, and undue prejudice to certain persons and localities in interstate commerce, on the other. The Commission also concluded that this unjust discrimination and undue preference and prejudice should be removed by establishing rates between points in Montana, except on certain traffic, which would reflect the same increases as may be maintained on like interstate traffic to

and from points in Montana under its authorization in *Ex Partes 162, 166,* and *168.* And, also acting under Section 13 (4), it ordered the Montana railroads to establish intrastate freight rates and charges no lower than those ascertained to be necessary to remove such unjust discrimination and undue preference and prejudice.

On petition of the State of Montana, its Board of Railroad Commissioners, and certain interveners, the District Court found that the Commission's order was not supported by adequate findings and permanently enjoined its enforcement. The following questions are presented:

Questions Presented

(1) Are the Commission's findings as to unjust discrimination against interstate commerce inadequate to justify its order because of the absence from its report accompanying said order and from its report in an antecedent proceeding, *Ex Parte 168,* of an express statement or finding to the effect that the increase in rates authorized in the last-named proceeding would be sufficient to meet increased costs of railroad operation on the assumption that a like increase would be procured in respect to intrastate rates?

(2) Are the Commission's findings as to unjust discrimination against interstate commerce inadequate because of its failure to state in precise dollars the exact amount of additional revenue from Montana intrastate traffic necessary to enable the railroads affected to furnish adequate and efficient transportation?

(3) Are the Commission's findings as to preference and prejudice as between persons and localities in interstate commerce on the one hand and intrastate commerce on the other inadequate to justify its state-wide order?

The questions presented summarize the points raised in the assignments of error, which are also presented.

Statutes Involved

Pertinent portions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C., 1, *et seq.*, provide as follows:

Sec. 3 (1). "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *."

Sec. 13 (3). "Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petitioner of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission.

The commission is also authorized to avail itself of the cooperation, service, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title."

Sec. 13 (4). "Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Sec. 15a (2). "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

The National Transportation Policy, 54 Stat. 889, notes preceding 49 U. S. C. 1, provides as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

The Questions Involved Are Substantial

During pendency of the respective nation-wide rate increase proceedings which resulted in the Commission's several authorizations in respect of interstate traffic in *Ex Partes 162, 166, and 168* there were prosecuted applications for corresponding increases in intrastate rates in the various states. Failure of some states to grant corresponding intrastate increases resulted in a series of proceedings before the Commission for orders under Section 13 (4) similar to the order here involved. In a number of instances the Commission has acted to require such intrastate in-

creases.[1] Some of the proceedings, however, are still awaiting decision by the Commission.[2] Continued inflationary trends since *Ex Parte 168* was concluded have resulted in a further nation-wide rate increase[3] and still another series of Commission proceedings for orders under Section 13 (4) may be expected. Huge amounts of revenue and a substantial part of the nation's commerce are involved.

Orders in but two of said proceedings have reached the courts: the order in the instant case and the Commission's order requiring increases in Florida intrastate rates tested in *King* v. *United States*, 101 Fed. Supp. 914, now on appeal (Supreme Court of the United States, October Term, 1952, No. 9). The Commission's order in the latter case was supported by findings in many respects similar to those here involved, and was held valid. Yet the diametrically opposite conclusion of the District Court in the instant case, unless set aside on appeal, will operate to prevent Montana intrastate shippers from being required to bear what the Commission has here concluded to be "their just and proper proportion of the national transportation burden", and cast doubt upon the validity of the Commis-

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[1] See for example *Increases in Alabama Freight Rates and Charges*, 274 I.C.C. 439; *Increases in Tennessee Freight Rates and Charges*, 272 I.C.C. 625; *Texas Intrastate Rates*, 273 I.C.C. 749; *Increases in Arizona Freight Rates and Charges*, 270 I.C.C. 105; *Kansas Intrastate Rates*, 277 I.C.C. 21; *Increases in Florida Intrastate Rates*, 278 I.C.C. 41; *Alabama Intrastate Rates and Charges, 1950*, 278 I.C.C. 605; *Iowa Intrastate Rates and Charges*, 284 I.C.C. 225; *Tennessee Intrastate Rates and Charges* (docket 30720), decided May 19, 1952; *Louisiana Intrastate Rates and Charges* (docket 30783), decided February 15, 1952.

[2] Among them are: Docket 30961, *Utah Intrastate Rates and Charges;* docket 30959, *Colorado Intrastate Rates and Charges; docket* 30960, *Nebraska Intrastate Rates and Charges;* docket 30962, *Wyoming Intrastate rates and Charges;* docket 30761, *Minnesota Intrastate Rates and Charges;* docket 31003, *Missouri Intrastate Rates and Charges.*

[3] *Ex Parte 175*, original report (March 12, 1951), 280 I.C.C. 179; report on further hearing (August 2, 1951), 281 I.C.C. 557; report on second further hearing (April 11, 1952), 284 I.C.C. 589.

sion's conclusions in the several thirteenth section cases referred to earlier. It would appear imperative in this situation, in view of the provisions of the National Transportation Policy for "developing, coordinating and preserving a national transportation system * * * adequate to meet the needs of the commerce of the United States, the Postal Service, and of the national defense", and considering the present national emergency, that the Supreme Court state definitively what findings are required to enable the Commission effectively to exercise its grave responsibility of protecting the nation's transportation from impediment and destruction by "the rivalries of local governments" (*Shreveport case*, 234 U. S. 342, 350); for unless the Commission may act promptly and effectively, the Congressional requirement will "be nullified and the administrative arm of the Commission paralyzed." *United States* v. *Louisiana*, 290 U. S. 70, 75.

Unjust discrimination against interstate commerce. In determining this issue the District Court did not examine the evidence before the Commission. It concluded, from inspecting the report supporting the order and the antecedent report in *Ex Parte* 168, "that the Commission * * * made no finding as to what amount of revenue, if any, was required from intrastate traffic in Montana to enable the railroads here affected to operate efficiently." It considered this to be fatal to an order under Section 13 (4) based on unjust discrimination against interstate commerce, citing *North Carolina* v. *United States*, 325 U. S. 507.

But, as we presently show, the Commission did find, to the degree of precision that a necessarily fluctuating traffic volume allows, what amount of revenue from intrastate traffic in Montana was required to enable the railroads affected to furnish adequate and efficient transportation. The Court's opposite view is clearly the result of its mis-

reading of the Commission's two reports in *Ex Parte* 168, 272 I. C. C. 695, and 276 I. C. C. 9.

In the initial report in *Ex Parte 168*, dated December 29, 1948, the Commission authorized nation-wide temporary rate increases ranging from 4 percent in the western portion of western territory to 6 percent in the eastern and southern portions of the country. 272 I. C. C. 716. These were to meet increased wage rates found to cost, at the then estimated traffic volume, and additional $350 million to $400 million annually. 272 I. C. C. 711. Under the second report in *Ex Parte 168*, dated August 2, 1949, a further 4 percent rate increase was authorized—an aggregate ranging from 8 percent in the western part of western United States to 10 percent in the east and south. These aggregate increases were permitted to be permanent or continuing. The 4 percent last authorized was to aid in meeting the expenses incident to the 40-hour work week to become effective September 1, 1949, estimated to cost $380 million annually. 276 I. C. C. 21, 111, 113.

It is conceded that these increased costs are incurred in handling both interstate and intrastate traffic. 284 I. C. C. 177. But the District Court stated that it was unable to ascertain that the *Ex Parte 168* increases authorized on interstate traffic were determined to "be sufficient [to meet increased costs] on the assumption that a like increase be procured thereafter in intrastate rates". It said:

> "Here the commission has made no finding that when the interstate increases are collected the railroads will still be short of the required revenues whatever those may be. If, as those proceedings suggest, the interstate increase will take care of the unstated required amount, then an appropriate adjustment of the whole matter would appear to be not that required by this order, but rather a lowering of the interstate rates there fixed accompanied by an appropriate increase of the intrastate rates which would result in an overall

> across the board increase of something less than 8 percent."

Contrary to the quoted language, the "required amount" was not "unstated". It was $350 million to $400 million for increased wage rates, 272 I. C. C. 711, plus $380 million, the cost of the 40-hour week, 276 I. C. C. 111—a total of $730 million to $780 million. To conclude that the Commission should have stated that when the rate increases it authorized were applied to the traffic on which they were to be applicable they would not bring in sufficient revenues to meet the increased costs of handling the traffic to which they were not applicable, is to say that the order's validity depended on performance of a ritual. The Commission said in its final report in *Ex Parte 168*, after discussing outlays necessary because of increased costs:

> "The anticipated revenue from the increases in rates and charges herein authorized and found to be just and reasonable is necessary to aid petitioners in meeting these outlays."

If there had been added after the word "outlays" the words "for interstate transportation", presumably the Court would have been satisfied. Because the Commission did not add those three words the Court assumed that the Commission authorized increases on interstate traffic which would subsidize intrastate transportation. And further, from that assumption the Court concluded that the intrastate rates here in issue could not be raised by the amount of the supposed subsidy without a redetermination of the entire nation-wide rate increase. This view, carried to its logical conclusion, would require as many nation-wide rate readjustments as there would be thirteenth section proceedings following *Ex Parte 168*.

The Court's conception disregards the fact that the Commission would have violated the law in providing for such

a subsidy. Section 13 (4) declares that "unjust discrimination against interstate commerce * * * is forbidden and declared to be unlawful." If the Commission itself should have provided for a burden on interstate commerce through such a subsidy, it would have effected as clear a violation of Section 13 (4) as any which should arise from a disproportionately low state rate adjustment. In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Public Utilities Commission*, 274 U. S. 344, the Supreme Court said at pages 350-351:

> "The carriers cannot maintain interstate lumber rates higher than otherwise justified by showing that they suffer loss or have inadequate returns from the intrastate transportation of logs."[4]

The Court points to nothing in *Ex Parte 168* which suggests this singular interpretation of its findings or order. The District Court should have read that report in a way which would avoid, rather than require, rendering this nation-wide order invalid. *Georgia Public Service Commission* v. *United States*, 39 Fed. (2d) 167, 170; *Adirondack Transit Lines, Inc.* v. *United States*, 59 Fed. Supp. 503.

Moreover, a simple calculation shows that the addition to total railway freight revenues, both intrastate and interstate, of the additional 4 percent authorized by the final report, would not produce in excess of $380 million annually, the cost of the 40-hour week. Four percent of $7,447

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[4] To like effect is *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456, at page 483, where the Court said:

> "The State cannot justify unreasonably low rates for domestic transportation considered alone, upon the ground that the carrier is earning large profits on its interstate business, and on the other hand the carrier cannot justify unreasonably high rates on domestic business on the ground that only in that way is it able to meet losses on its interstate business."

See also *Minnesota Rate Cases*, 230 U.S. 352, 435; *Smyth* v. *Ames*, 169 U.S. 466, 541.

million, the total amount of freight revenue, state and interstate, which the Commission, in its final report in *Ex Parte 168*, estimated for 1949 for the country as a whole, on the basis of then-existing rates (276 I. C. C. 20), amounts to less than $300 million. The cumulative *Ex Parte 168* increases, authorized to be made permanent in the final report, ranging from 8 percent to 10 percent, if applied on all freight traffic, could not, on the aforesaid revenue estimate, produce more than $730 to $780 million, the aggregate cost of the increased wages referred to in the initial report and the 40-hour work week mentioned in the final report. The Court could not assume, therefore, that the Commission intended that the increases in interstate rates alone would meet the increased costs of handling both interstate and intrastate traffic.

There are other reasons why it must be concluded that the District Court has misread *Ex Parte 168*.

The initial report states that the Commission "invited the cooperation of the State regulatory bodies, as obviously State-made rates would be involved." 272 I. C. C. 700. A committee of State Commissioners was present at both the initial and final hearings. *Id.;* 276 I. C. C. 13. This cooperation and the statement quoted would have been idle if the Commission had granted interstate increases sufficient to carry the increased costs of intrastate transportation, for then State-made rates would not be involved.

The opening sentence of the initial report, 272 I. C. C. 698, is to the effect that *Ex Parte 168* must be read in connection with the latest report in *Ex Parte 166*, 270 I. C. C. 403, and that *Ex Parte 168* "may be considered in effect, if not in form, a part of the series" of general increase cases embracing *Ex Parte 162* and *Ex Parte 166*. The report in *Ex Parte 166* at 270 I. C. C. 403 contains express statements, implicit from other language of that

report, that the interstate increases authorized in that proceeding

> "* * * presuppose that generally similar increases will be permitted by State authorities on intrastate traffic, or may become effective otherwise."

270 I. C. C. 428, 437, 440. There was no occasion to repeat in each report of the series this statement of the obvious. It was to be assumed that the quoted presupposition would continue throughout the series until the contrary was expressed. Moreover, the official notice of the Secretary of the Commission to the public at the times the reports in *Ex Parte 168* were released, the Commission's Annual Reports to the Congress, and statements of the Commission in subsequent reports [5] all state that the interstate increases

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[5] In *Kansas Intrastate Freight Rates and Charges*, docket 30869, July 21, 1952 (mimeographed), the Commission said on Sheet 20:

> "The proposed increases on Kansas intrastate traffic were part of nation-wide increases sought by the railroads on all interstate and intrastate traffic. In authorizing the general increases in Ex Parte No. 168, we assumed that like increases would be authorized by the States upon intrastate traffic, and that the intrastate traffic would bear its fair proportionate share of such increases."

In the instant report, docket 30674, *Montana Intrastate Freight Rates and Charges*, the Commission said at 284 I.C.C. 203:

> "The findings in Ex Parte Nos. 162, 166, and 168 authorizing increases in interstate rates and charges indicate that like increases ought to be made in intrastate rates and charges including those within Montana."

In *Iowa Intrastate Rates and Charges*, 284 I.C.C. 225, the Commission said (p. 249):

> "The increases sought on Iowa traffic were part of Nation-wide increases proposed by the railroads on all interstate and intrastate traffic. In Ex Parte Nos. 162, 166, and 168 we authorized similar increases, which have, for some time, been applied on interstate traffic throughout the country, including that to, from, and through Iowa; also intrastate generally within the several States. The railroads' need for additional revenue to meet increased operating expenses, as

authorized were intended only to take care of revenue needs arising from handling interstate traffic.[6]

In the instant thirteenth section case, the Commission found that the Montana rail carriers in 1949, after collecting the *Ex Parte 168* increases during that part of the year that they were effective on interstate traffic, earned a rate of return of only 2.43 percent on net investment. 284 I. C. C. 174. This compares with a rate of return of 5.70 percent, which the Commission found in *Ex Parte 166* would be reasonable for United States railroads as a whole for a constructive normal year. 270 I. C. C. 437. The 2.43 rate of return may also be compared with a rate of return of 3.23 for United States railroads, which the Commission in *Ex Parte 168* estimated would result for the year 1949 if the final *Ex Parte 168* increases were not granted, a return which it then considered so low as to require a further increase, in *Ex Parte 168*, of 4 percent. 276 I. C. C. 24.

The Commission also found in the instant thirteenth

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determined in those proceedings, was the underlying basis for our conclusions therein. The increased operating costs were not confined to interstate traffic, but were, and are, incurred as well on Iowa traffic. In estimating the yield from the rate increases thus authorized intrastate traffic was included."

[6] The District Court states with reference to the Secretary's notices and the Annual Reports:

"We think it is clear that the absent finding cannot be supplied by these Press Notices or the Commission's Reports."

These defendants-appellants do not contend that an absent finding can be supplied by reference to these documents. The Commission's statement in *Ex Parte 168* that increases in interstate rates were necessary to meet certain outlays can, of course, be read as meaning that such increases were necessary to meet these outlays in handling interstate traffic, i. e., the traffic to which the rate increases were applicable. If this be the correct understanding, then it did not become necessary for the Commission also to say, redundantly, that the railroads would still be short of required revenues to meet the cost of handling intrastate traffic unless the states authorized corresponding increases. The Notices and Annual Reports were referred to merely to show the Commission's subsequent administrative interpretation of its own express language.

section case that it was impossible to segregate the costs of handling Montana intrastate from interstate traffic; that the unit cost of handling Montana intrastate traffic approximated the cost of handling interstate traffic to, from or through the state;[7] that there was a substantial disparity between comparable interstate and intrastate rates; that the interstate rates were reasonable and the intrastate rates, when subjected to the increases ordered, would be reasonable; that Montana intrastate rates were not contributing their fair share of revenues required by the Montana railroads to enable them to render adequate and efficient service and to operate profitably and thereby accomplish the purposes of the Interstate Commerce Act and the National Transportation Policy and that the burden thus cast upon interstate commerce was undue to the extent that the intrastate rates and charges within Montana were less than they would be on the basis approved; that establishment of the increases in issue would produce more than $600,000 per year in revenue to the Montana railroads, which would constitute not more than a fair proportion of their total income; and that the maintenance of intrastate rates on bases lower than those approved caused and, in the future would cause, unjust discrimination against interstate commerce. 284 I. C. C. 204-5.

These defendants-appellants submit that from the facts discussed in the instant report and the findings in *Ex Parte 168*, the conclusion inevitably followed that no less than $600,000 per annum was the amount required from Montana intrastate freight traffic to enable the railroads affected to meet the increased expense of the higher wages and shorter hours discussed in *Ex Parte 168* insofar as attributable to handling Montana intrastate traffic, and

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[7] For a parallel situation see *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 483-4.

accordingly, to the extent that such roads were deprived of said additional sum, that the burden cast on interstate commerce was undue. The Commission so found.[8] Its findings are more detailed and exhaustive than those scrutinized by the Supreme Court and held, in *United States v. Louisiana*, 290 U. S. 70, to sustain a similar order of the Commission. There, as here, the Commission had not found the precise amount needed from intrastate traffic to enable the railroads to operate efficiently.[9] The Supreme Court there said at page 80:

> "There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission * * *."

The Court said further, at page 79:

> "The case of the Louisiana rates was not alone before the Commission, and it should not be treated as though it were. A number of other states, contesting in the aggregate a wide range of rates, were heard at the same time. * * * It sufficed that the Commission found that Louisiana showed nothing in the cir-

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[8] The Commission also stated in its discussion in Docket 30674:

> "Increased costs are, however, as applicable in Montana as in any other place, and on the assumption that the relationship of the Montana intrastate rates to the interstate rates prior to the general rate increase proceedings were proper, the former should be increased to the same extent as the latter to maintain that relationship." 284 I.C.C. 177.

It is doubtful that the assumption referred to was necessary to enable the Commission to reach the ultimate conclusions which it did in this proceeding, particularly in view of the extensive discussion of facts already referred to. However, a previous thirteenth section order involving Montana intrastate rates predicated on the identical assumption was sustained in *State of Montana v. U.S.*, 2 Fed. Supp. 448, affirmed *per curiam*, 290 U. S. 593.

[9] The pertinent findings therein involved are at 186 I.C.C. 624 and 642-3.

> cumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable; and that it saved the rights of interested parties to test the reasonableness of any individual rate." [10]

United States v. *Louisiana, supra,* and *State of Montana* v. *United States, supra,* and other similar cases require that the Commission's order here must be sustained and that the District Court must be reversed.

United States v. *Louisiana* is cited with approval in *North Carolina* v. *United States,* 325 U. S. 507, 520, which is the holding which led the Court below to enjoin the order. We show below why the *North Carolina* case does not support the District Court's conclusion. We also note that that decision did not prevent the United States District Court for the Northern District of Florida in *King* v. *United States,* 101 Fed. Supp. 941, discussed *supra,* from sustaining the Commission's state-wide order in *Increases in Florida Intrastate Rates,* 278 I. C. C. 41, on findings somewhat similar to those made here.

In the *North Carolina* case, unlike the situation here, there had been no finding in a general revenue case which antedated the Commission's report under review to the effect that the interstate passenger fares throughout the South were required to be increased, to the extent involved in the thirteenth section order there passed upon, so as to enable the railroads in the South to furnish adequate and efficient transportation. On the contrary. 325 U. S. 517. The four North Carolina railroads involved were enjoying unprecedented prosperity, a situation which may be contrasted with the comparative poverty of the Montana lines shown in this case. These circumstances, among others,

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[10] A similar saving clause is included in the Commission's report now under review.

which distinguish that case from this, led the Supreme Court by a 5-4 decision to hold that it could not sustain the compulsory increase of intrastate passenger fares to the interstate level on a showing which consisted practically entirely of rate disparities. Nowhere in *North Carolina* v. *United States* did the Supreme Court say, affirmatively, that as a condition to a thirteenth section order based on revenue discrimination the Commission must make a finding of what precise number of dollars from intrastate traffic would be necessary to maintain efficient transportation by the railroads affected. The fact that *United States* v. *Louisiana* was there cited with approval indicates that there was no intent to change the rule of that and similar cases.

The Court below believed that there was a similarity between the instant case and the *North Carolina* case because it was unable to see that in *Ex Parte 168* the Commission had merely determined that the interstate increases, aggregating 8 percent in the far West, would be sufficient to enable the railroads to furnish adequate and efficient interstate transportation and had not found that such increases on interstate traffic would maintain intrastate transportation also. We have demonstrated that this interpretation of the Commission's *Ex Parte 168* order was egregious error. Since it was this error which suggested to the District Court a parallel between the present case and *North Carolina* v. *United States*, it follows that a correction of that misinterpretation effectively distinguishes that decision.

The Commission's series of general revenue cases demonstrate, among other things, how railway operating expenses move sharply with changes in traffic volume and other variables. Fluctuations of traffic and changes in other factors affecting operating costs are continuous and, of course, are not predictable to a nicety. Under these circumstances, for the Commission to attempt to find, on a record which has been closed, the precise dollar contribu-

tion from Montana intrastate transportation which will be continuously required for maintaining adequate and efficient railway transportation, both intrastate and interstate, would be both unrealistic and futile. Neither *North Carolina* v. *United States* nor any other holding of the Supreme Court compels findings of impossible exactitude as a condition to the Commission's exercise of the important responsibility of preserving the nation's commerce against disproportionate contributions from state traffic. The Commission's findings here were all that could be reasonably expected of it and fully sustain its order.

Preference and prejudice as between persons and localities in intrastate commerce on the one hand and interstate commerce on the other. The District Court did not examine the evidence before the Commission. Its holding, simply stated, is "that the findings as to preference and prejudice as between persons and localities will not sustain the general order now before us."

The Commission's report contains both general findings and eighteen pages of subsidiary findings. The report also contains a "saving clause", as approved by the Supreme Court in *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 579.

The Commission's general findings on unjust discrimination, already referred to, are applicable also to the issue of undue preference and prejudice as between persons and localities. There is in addition a general finding that:

> "* * * there is active competition between persons and localities engaged in interstate commerce between points in Montana and points in other Western and Northwestern States, on the one hand, and persons and localities engaged in intrastate commerce in Montana, on the other hand, and * * * this competition extends throughout the entire State of Montana and to class and commodity traffic." 284 I. C. C. 204.

The subsidiary findings relate to specific interstate and intrastate rate relationships and to movement and competi-

tion with respect to class rated traffic, livestock, farm crops, feed, sugar beets, wet beet pulp, dry beet pulp, limerock, beet sugar molasses, coal, cement, ores and concentrates, petroleum and petroleum products, asphalt, logs and lumber, and with respect to less-than-carload traffic in articles such as oil and automobile parts, window glass, etc.

Defendants-appellants called the attention of the Court below to evidence before the Commission showing that the disparities between the increases on interstate rates and those on intrastate rates with respect to the particular items specified in the subsidiary findings deprived the Montana railroads of at least $535,550 per year, and that such sum would be a major portion of the total annual revenue deprivation of $600,000 or more per year found by the Commission to result from the rate differences in issue. The District Court refused to consider such evidence, stating that it was not obliged "to delve into the record and go behind the Commission's findings." It said further:

> "* * * we cannot perceive how findings of instances of preference and prejudice in the case of shipments of coal, petroleum products, cement and other items listed in the report could justify a general order relating to shipments of books, paper, household goods, harnesses, farm machinery, paints, lumber and a mass of other items not mentioned in the Commission's report."

The quoted statement overlooks the fact not only that lumber *is* mentioned in the Commission's report, 284 I.C.C. 196, but also that there is nothing whatever in the report which would justify an assumption that books, paper, household goods, harnesses, farm machinery and paints move intrastate in Montana in a volume of any consequence or that if they do so move they are not subject to class rates, which the report adequately covers. 284 I.C.C. 178-9.

In *Nashville Ry.* v. *Tennessee*, 262 U. S. 318, the Supreme Court, in reviewing a finding as to preference and prejudice

involving intrastate rates, speaking through Mr. Justice Brandeis, said that the Commission's findings of undue preference of intrastate shippers and localities and undue prejudice to interstate shippers and localities were necessarily conclusive, since the evidence on which it acted was not introduced (p. 324). The instant findings of the Commission on the same issue here should be equally conclusive where the evidence on which the Commission acted was introduced but ignored and the Commission's report does not justify the Court's assumption that the subsidiary findings omit mention of important traffic.

Two authorities are cited in the opinions of the Court below to support its conclusion that the Commission's findings of preference and prejudice do not support its state-wide order. They are *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563, and *North Carolina* v. *United States*, 325 U. S. 525. Neither is in point.

The first authority, the *Wisconsin Railroad Commission* case, holds that a state-wide order requiring a horizontal increase in intrastate passenger fares may not be sustained as an order to remove undue prejudice to persons traveling in interstate commerce where it embraces not only those intrastate fares to and from border points, which, under the Commission's findings, may work prejudice to interstate passengers, but also fares between points more remotely internal "*from which no prejudice can arise upon the facts found by the Commission.*" (Emphasis supplied.) The findings there, which are recited at 257 U. S. 565-566, were held to be such as to "justify a finding against a large class of fares" but not fares between interior points, which were "not within the class or reason of the order." 257 U. S. 579. The general order in the instant case is, however, justified by the general findings referred to earlier, including the finding that interstate and intrastate competition "extends throughout the entire State of Montana and to class and

commodity traffic," and also by the extensive subsidiary findings with respect to illustrative rate adjustments. For example, the Commission found that in the shipment of petroleum products, petroleum refineries at interior points such as Billings, East Billings, Laurel, Great Falls, and other points compete in markets throughout Montana with out-of-state refineries which must absorb rate differences not justified by transportation conditions (284 I.C.C. 194) and found that somewhat similar prejudicial situations existed with respect to saw logs,[11] cement,[12] livestock, sugar beets, ores and concentrates, and various other articles and commodities which move in competition in both interstate and intrastate commerce (284 I.C.C. 178-197). Further detail was not required, for "the Commission is not compelled to annotate to each finding the evidence supporting it." *U. S.* v. *Pierce Auto Lines,* 327 U. S. 515, 529.[13]

The holding in *North Carolina* v. *United States,* 325 U. S. 507, the second authority cited by the Court below in support

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[11] The factors leading to the findings of preference and prejudice with respect to saw logs were:

(1) A substantial rate disparity on the inbound movements of interstate and intrastate logs for comparable hauls;

(2) Actual movements in volume, both state and interstate;

(3) An adjustment in rates on the outbound product under which mills receiving inbound logs under different rate adjustments ship lumber to a common market at the same group rate; and

(4) Competition in that market between the mills receiving intrastate shipments of logs and the mills receiving interstate shipments of logs. (284 I.C.C. 196)

[12] The Commission found that there were regular movements of cement to numerous Montana destinations over both intrastate and interstate routes; that the intrastate rates are substantially lower by reason of the failure of the Montana Board to grant increases similar to those authorized on interstate movements in *Ex Parte 168;* and that the disparity works to the disadvantage of out-of-state cement mills which ship into Montana in competition with the local producer at Trident. (284 I.C.C. 192.)

[13] The District Court stated that some of the Commission's statements concerning rate disparities, such as those with respect to mattresses and box springs, coal, and molasses, "lack a sufficient definiteness and specificity to be significant." However, the Commission made further comments

of its conclusion. is that a mere finding that interstate passengers paid higher fares than intrastate passengers for the same service does not adequately support a state-wide order nullifying state-prescribed passenger fares on the ground of prejudice to interstate passengers. The case is clearly distinguishable on the same ground as the *Wisconsin Railroad Commission* case.

Prejudice and preference as between shippers and localities was the sole basis of the order involving state-made rates in the *Shreveport case, Houston, E. & W. T. R. Co.* v. *United States,* 234 U. S. 342. Nevertheless, certain "merely illustrative" comparisons of class rate scales and rates on

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with respect to other shipments of class rated traffic (which would embrace mattresses and springs), coal, molasses, and other articles which are not mentioned by the Court. The Commission's discussion as a whole lists a sufficient number of instances of actual preference and prejudice to demonstrate that the general findings have substantial evidentiary support and it is not material that portions of the discussion, of themselves, did not appear significant to the Court.

With reference to the Commission's discussion concerning sugar beets, the Court states "that the main preference and prejudice, if any, operates against the sugar mill rather than the producer." The Court says further that since the owners of the mills intervened in the District Court in support of the State of Montana, the rail carriers may not be in a "position • • • to claim any advantage from the • • • disparity in rates as to sugar beets." Section 13 (2) of the Act provides in part: "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant." The Court's conclusion that the sugar mill rather than the producer is affected by the rate disparity is not quite the same as the Commission's. The Commission was careful to say:

> "*Either* the grower *or* the sugar company will, however, be affected by the increases sought, if granted." (Emphasis supplied; 284 I.C.C. 190.)

The findings of the Commission, the administrative tribunal which examined the evidence and is informed by experience to pass upon the complex question of undue preference and prejudice, are conclusive on that issue where the Court does not review the evidence. *Nashville Ry.* v. *Tennessee,* 262 U.S. 318. They are also conclusive if the Court examines the record and it appears that the Commission's findings are supported by substantial evidence. *United States* v. *Ill. Central R.R.,* 263 U.S. 515, 526; *Virginian Ry.* v. *United States,* 272 U.S. 658, 665; *United States* v. *Chicago Heights Trucking Co.,* 210 U.S. 344, 354. The Court could not here substitute its judgment in the field of the administrative agency.

wagons, furniture, and other articles (234 U. S. 346, 23 I. C. C. 63-68) were held to justify general findings and to support the order there sustained, forbidding the charging of rates "for the transportation of *any article*" (234 U. S. 348; emphasis supplied) inconsistent with the rate relationship required to be established and maintained. Though the territorial scope of the order there considered was not state-wide, it covered rates on "any commodity" shipped within the defined area. It has since been held that "when an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings" as to rates which are, as here, state-wide. *Georgia Comm.* v. *United States,* 283 U. S. 765, 774. There the Court said:

> "While the order relates only to a few commodities, the scales of rates are statewide in operation; and they apply to shipments between hundreds of points of origin and destination. To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief."

See also, *United States* v. *Louisiana,* 290 U. S. 70, 75-6; *New England Divisions Case,* 261 U. S. 184, 197-199.

Here the Commission made the basic or jurisdictional findings upon which depend its power to enter an order removing prejudice to interstate shippers and localities from an undue preference which extends to all intrastate traffic throughout Montana. It also made numerous subsidiary findings concerning typical instances of preference and prejudice which support its general findings. The "saving clause" affords protection for those able to make a case for special treatment. Since there is no question of the sufficiency of the supporting evidence, the Commission's findings are conclusive. *Nashville Ry.* v. *Tennessee, supra; United States* v. *Chicago Heights Trucking Co., supra; Ayershire Collieries Corp.* v. *United States,* 335 U. S.

573, 593; *State of Texas* v. *United States*, 84 Fed. Supp. 791, affirmed *per curiam* 337 U. S. 911.

The Commission's order must be sustainsd if its findings are adequate either on the issue of unjust discrimination against interstate commerce or the issue of undue preference and prejudice as between persons and localities. *North Carolina* v. *U. S., supra.*

For the reasons indicated, these defendants-appellants submit that this appeal presents substantial questions of general importance.

Dated October 9, 1952.

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APPENDIX "A"

INTERSTATE COMMERCE COMMISSION

No. 30674

MONTANA INTRASTATE FREIGHT RATES AND CHARGES

Submitted July 19, 1951. Decided February 4, 1952

Intrastate freight rates and charges in Montana found to cause unjust discrimination against interstate commerce, undue preference of and advantage to certain persons and localities in intrastate commerce, and undue prejudice and disadvantage to certain persons and localities in interstate commerce.

Conrad Olson, L. C. Smith, L. E. Torinus, Jr., W. A. Hart, J. E. Goggin, R. C. Sanders, Leroy D. Smith, Eldon Martin, Elmer B. Collins, and William Gullickson for respondents.

Arlus C. Morris and H. W. Prickett for interveners supporting respondents.

John W. Bonner, Arnold H. Olson, Louis E. Poppler, Edwin S. Booth, William P. Mufich, Paul T. Smith, Horace F. Casey, and Sidney T. Smith for the State of Montana, the Board of Railroad Commissioners of the State of Montana, and an individual, protestants.

P. J. Gilfeather, Lowe P. Siddons, H. W. Ansell, P. H. McMaster, F. J. Rebhan, K. M. Brown, Alfred H. Dougherty, Baxter Larson, I. N. Early, James V. Keyes, F. B. Price, M. Jack Newman, Orrin J. Guanell, Chas. E. Blaine, R. C. Kitchingman L. F. Nichols, W. J. Howard, C. T. Sanders, Clarence Hanley, T. C. Taylor, David M. Reese, O. C. Garlington, A. T. Bowen, R. C. Dean, S. E. Whitworth, Milton C. Simpson, Norman O. Blevins, C. M. Wall, R. H. Robinson, W. Preston Wright, Everett E. Shuey, Edwin A. Phillips, and William G. Ragen for numerous shippers, protestants.

Report of the Commission

CROSS, *Commissioner:*

Exceptions to the report proposed by the examiner were filed by protestants, to which respondents replied, and the

issues were argued, orally. Our conclusions differ, in part, from those recommended by the examiner. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

Issues.—This proceeding is an investigation under section 13 of the Interstate Commerce Act concerning the lawfulness of Montana intrastate freight rates and charges.[14] Responsive to a petition filed by the principal railroads serving Montana, we entered upon this investigation for the purpose of determining whether the rates and charges of the common carriers by railroad operating in Montana, or any of them, for the intrastate transportation of property, made or imposed by authority of the State of Montana, cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and, if so, what rates and charges, or what maximum or minimum, or maximum and minimum, rates and charges shall be prescribed to remove any unlawfulness found to exist.

All carriers by railroad operating in Montana which are subject to our jurisdiction were made respondents.[15] Copies of the order of investigation and notice of hearing were served upon each of them and upon the State of Montana.

In *Increased Railway Rates, Fares, and Charges, 1946*, 266 I. C. C. 537, decided December 5, 1946, herein referred to as Ex Parte No. 162, we authorized general increases in the interstate freight rates and charges, with few exceptions, of carriers subject to part I of the act, of 25 percent

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[14] Rates and charges are stated in amounts per 100 pounds, except as otherwise indicated.

[15] Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, Montana, Wyoming & Southern Railroad Company, Butte, Anaconda & Pacific Railway, and White Sulphur Springs & Yellowstone Park Railway Company. These carriers will be referred to by their short titles.

in official territory, 20 percent in and between other territories, and 22½ percent between official and other territories, subject to certain minimum amounts on particular commodities and to specific flat increases on others. We also authorized an increase in the minimum charge per shipment to $1, except on single shipments of milk and cream, and stated that minimum line-haul rates were pickup and delivery services are included may be increaesd to 50 cents, as provided in the prior interim findings in that proceeding, as hereinafter specifically indicated. The rates as thus increased, effective January 1, 1947, were found to be just and reasonable. On class rates, this authorization subsequently was modified so as to authorize a uniform increase of 22½ percent in all class rates, not including rates based on classification exception ratings, affected by the decision in *Class Rate Investigation, 1939*, 262 I. C. C. 447, 264 I. C. C. 41, and 268 I. C. C. 577. The interstate rates as thus revised became effective August 22, 1947.

In a report of June 20, 1946, in Ex Parte No. 162 and a companion proceeding, herein referred to as Ex Parte No. 148,[16] 264 I. C. C. 695, we had authorized certain interim increases in interstate rates and charges, generally 6 percent in western territory, which became effective July 1, 1946. Following that authorization, respondents requested authority from the Board of Railroad Commissioners of the State of Montana, hereinafter referred to as the Montana commission, to make corresponding increases on intrastate traffic. That request was granted except (1) on beet sugar, molasses, limerock, sugar beets, sugar-beet pulp, and sugar-beet seed, (2) in connection with the minimum rate for pickup and delivery service; and (3) on coal, as to which the Montana commission granted increases per ton[17] of 3 and 5 cents, respectively, depending upon the measure of the basic rate, instead of respective increases of 6 and 8 cents authorized by us. The intrastate rates thus revised became effective July 22, 1946.

On December 14, 1946, respondents filed with the Mon-

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[16] *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545 (original report).

[17] Tons stated herein consist of 2,000 pounds.

tana commission a further request seeking additional increases in the intrastate rates and charges corresponding in all respects to those approved in the Ex Parte No. 162 report of December 5, 1946. On February 11, 1947, such authority was granted by that commission, except that it allowed the publication of a minimum charge per shipment of 75 cents and a minimum rate of 35 cents, instead of the minimum charge and minimum rate of $1 and 50 cents, respectively, authorized by us.

Subsequently, in *Increased Freight Rates, 1947*, 269 I. C. C. 33, decided October 6, 1947, and referred to as Ex Parte No. 166, we authorized, subject to certain exceptions, interim increases of 10 percent in the interstate freight rates and charges of the carriers hereinbefore identified which became effective October 13, 1947. Prior thereto on September 29, 1947, respondents filed an application with the Montana commission requesting it to find that any interim increases which we might find just and reasonable on interstate traffic would also be just and reasonable on intrastate traffic. On October 16, 1947, respondents filed an amendment to that application pointing to the fact that we had rendered our interim decision, as above indicated, and requested authority to establish like increases on Montana intrastate traffic. That request was granted on December 26, 1947. The rates thus increased became effective January 22, 1948.

In the report on further hearing in that proceeding, 270 I. C. C. 81, decided December 29, 1947, we authorized an interim increase of 20 percent on the traffic there under consideration in lieu of the 10 percent previously granted. On January 7, 1948, respondents filed an amended application with the Montana commission requesting approval of increases in intrastate traffic, corresponding with the interstate increases, to be applied to the rates in effect January 21, 1948. After a further hearing thereon the Montana commission on February 21, 1948, authorized respondents to establish certain increases in intrastate rates and charges as requested, except on sugar beets and livestock, in the same manner and to the same extent as had been authorized by us on interstate traffic, such increases to be

applied to the rates and charges in effect on January 21, 1948.

In the supplemental report on further hearing in that proceeding, 270 I. C. C. 93, decided April 13, 1948, we authorized increases, subject to certain exceptions, in lieu of the prior interim increases, of 30 percent within eastern territory; 25 percent within southern territory, from, to and within zone I of western trunk-line territory, and interterritorially between southern and western territories and between those territories, on the one hand, and eastern territory, on the other; and 20 percent within western territory other than zone I of western trunk-line territory. The above findings did not authorize further percentage increases in western territory, which includes Montana, although new maximums were authorized for certain enumerated commodities. Thereupon all rail carriers operating in Montana filed supplemental petitions with the Montana commission requesting (*a*) authority to make the same increases and changes in the rates and charges on intrastate traffic as had been authorized on interstate traffic and (*b*) reconsideration of the exception as to livestock and sugar beets contained in the prior order of the Montana commission with authority to apply on those commodities the full 20 percent increase authorized by us instead of the 10 percent then in effect. After a hearing thereon the Montana commission on June 1, 1948, granted the increases sought except as to livestock and sugar beets on which the increase in rates was confined to the prior authorization of 10 percent. In the report on further consideration therein, 270 I. C. C. 403, decided July 27, 1948, we modified our prior final findings by an additional finding prescribing an increase of 22½ percent between western territory, other than western trunk-line zone I, and zone I of western trunk-line territory. Thereupon the rail carriers again petitioned the Montana commission for allowance of the same increases and changes in the rates on intrastate traffic as had been authorized in the above report. After further consideration the Montana commission on August 9, 1948, found that the increases and changes authorized by us in our final report of July 27, 1948, would be fair and reason-

able for application on intrastate traffic, except that no further increases should be granted on livestock and sugar beets other than the 10 percent authorized by it on December 26, 1947.

In *Increased Freight Rates, 1948*, 272 I. C. C. 695, decided December 29, 1948, herein referred to as Ex Parte No. 168, interim increases of 6 percent in and between official and southern territories, 5 percent in western trunk-line zone I, 4 percent in the remainder of western territory, and 5 percent interterritorially other than between official and southern territories, with certain exceptions, were authorized, which became effective January 11, 1949. In the final report therein, 276 I. C. C. 9, decided August 2, 1949, increases were authorized, with certain exceptions, of 10 percent in and between eastern and southern territories, 9 percent in western trunk-line zone I, 8 percent in the remainder of western territory, and 9 percent interterritorially other than between eastern and southern territories. The 8-percent increases in western territory became effective on interstate traffic on September 1, 1949.

On or about October 27, 1948, respondents filed a petition with the Montana commission requesting that the circumstances and conditions which then required an increase in interstate freight rates and charges, both as an interim measure and as sought permanently in Ex Parte No. 168, be applied equally to intrastate freight rates and charges. At a hearing on January 27, 1949, before the Montana commission, respondents sought a 4-percent temporary increase on intrastate traffic the same as that authorized by us on interstate traffic on December 29, 1948. That request was denied on March 9, 1949. On or about August 20, 1949, subsequent to the final report in Ex Parte No. 168 wherein an increase of 8 percent generally was authorized on interstate traffic in western territory, respondents again requested the Montana commission to permit the publication for intrastate application of the same increases as had been granted by us for interstate application in the same general territory. That request was denied by the Montana commission on November 16, 1949. A petition for reconsideration of that order of denial filed by respondents with the Montana commission was denied on January 17, 1950.

As previously indicated, only certain portions of the Ex Parte Nos. 162 and 166 increases and none of the Ex Parte No. 168 increases have been made effective on Montana intrastate traffic. Except as herein indicated, respondents seek the remainder of the Ex Parte Nos. 162 and 166 increases and all of the Ex Parte No. 168 increases. They estimate, as specifically hereinafter indicated, that the annual revenues thus lost to them on Montana intrastate traffic approximates $700,000. To offset that loss, respondents propose to increase for Montana intrastate application (*a*) the present minimum rate and minimum charge from 42 and 90 cents to 65 cents and $1.30, respectively, (*b*) the present rates on livestock and sugar beets by approximately 18.8 percent, and (*c*) the rates on all other commodities by 8 percent.

Motions for dismissal.—At the beginning of the hearing in this proceeding the Montana commission filed a motion to dismiss respondents' petition to the extent it related to any increase in rates and charges authorized by us on interstate traffic in Ex Parte No. 162 and in reopened Ex Parte No. 148, consolidated therewith. The motion was based on the fact that the Montana commission by order dated February 11, 1947, had granted, for application on intrastate traffic, all increases in rates and charges authorized by us for application on interstate traffic in Ex Parte Nos. 148 and 162, except that the Montana commission fixed the minimum rate where pickup and delivery is performed at 35 cents, and the minimum charge at 75 cents, in lieu of 50 cents and $1, respectively, authorized in those proceedings for application on interstate traffic. In support thereof the Montana commission pointed out that respondents had not requested reconsideration of its order as to the basic minimum rate and minimum charge in any of their subsequent petitions, or by any other means; that by their failure to request such reconsideration, respondents have acquiesced in and accepted the basic minimum rate and minimum charge authorized by the Montana commission and should not be permitted to request increases therein; and that the basic minimum rate and minimum charge thus fixed by it for application on intrastate traffic were increased percentagewise to the ex-

tent authorized by us for application on interstate traffic in Ex Parte No. 166.

At the conclusion of respondents' evidence on direct examination, the Montana commission orally moved that respondents' petition be dismissed in its entirety on the ground that the evidence failed adequately to show (1) any undue prejudice of persons, localities, or commodities in interstate commerce, (2) any operating costs from which it could be determined whether or not the revenues received from the Montana level of intrastate rates compare favorably with those accruing under interstate rates, (3) any evidence which proves that the increase in revenues sought will accrue to respondents, and (4) that any of the rates as fixed by it are unreasonable or in violation of any provision of the act, particularly sections 13 and 15. Rule 70 of our General Rules of Practice provides that "An officer shall have no power to decide any motion to dismiss the proceeding or other motion which involves final determination of the merits of the proceeding." The findings hereinafter made are amply supported by the record herein.

At the hearing in this proceeding, the Governor of the State of Montana read into the record a statement protesting any modification in the orders issued by the Montana commission relative to Ex Parte Nos. 162, 166, and 168, and requesting us to institute appropriate proceedings with a view to determining proper, reasonable, and equitable freight rates for the State of Montana. The statement was received into the record for our consideration. As indicated by its heading "In the Matter of Montana Intrastate Docket No. 30674" the statement was specifically directed to the matters with respect to which the instant proceeding was instituted, and as to which a hearing was then in progress. It cannot be considered as a petition for investigation of the scope indicated therein under the provisions of rules 4, 16, and Form No. 4 of our General Rules of Practice.

Montana economic conditions.—In 1939, the total income payments to individuals in Montana approximated $288,000,000 as compared with $787,000,000 in 1949, an increase over the earlier year of 173 percent. In the northwest

region[18] the total income payments of individuals ranged from $3,099,000,000 in 1939 to $9,822,000,000 in 1949, reflecting an increase over the earlier year of 217 percent and exceeding by 44 percent the percentage increase in Montana. In the entire United States the total income paid to individuals in 1939 amounted to $70,601,000,000 as compared with $197,531,000,000 in 1949, reflecting an increase of 180 percent which exceeded the percentage increase in Montana by 7 percent. The income payments per capita in Montana ranged from $515 in 1939 to $1,390 in 1949 as compared with like payments during these years ranging from $418 to $1,273 in the northwest region, and from $539 to $1,330 in the entire United States. In the latter year the average income per capita[19] in Montana exceeded the average of all the other States throughout the entire country.

The gross farm income in Montana was $93,422,000 in 1939 as compared with $386,519,000 in 1949. In those respective years net incomes were $26,661,000 and $205,519,000 from agriculture proper, and $10,573,000 and $3,379,000 from Government subsidies, aggregating incomes from products of agriculture and Government payments of $37,234,000 and $208,989,000. The net income realized by farmers from agriculture was only 28.54 percent in 1939 as compared with 53.17 percent in 1949 of the gross farm income. Expenditures for 1939 and 1949 were $66,761,000 and $181,000,000, respectively.

Respondents' property investment and revenues.—The gross property investment for the several systems of the class I railroads serving Montana in road and equipment used in transportation service plus cash, materials, and supplies as shown by their books at the end of the years indicated was $3,767,670,172 in 1929, and ranged from $3,793,681,728 in 1939 to $4,703,062,620 in 1949. The net property investment was $3,504,100,267 in 1929, and from 1939 to 1949, inclusive, ranged from $3,387,460,859 to $3,735,865,966. The rate of return on the net investment was

[18] Colorado, Idaho, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming.

[19] Survey of Current Business, August 1950, published by the U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce.

4.86 percent in 1929, 2.17 in 1939, 2.62 in 1940, 2.72 in 1941, 5.79 in 1942, 5.57 in 1943, 4.68 in 1944, 4.15 in 1945, 3.17 in 1946, 3.72 in 1947, 3.93 in 1948, and 2.43 in 1949. There was a decline in the rate of return from 1944 to 1946, inclusive. Like information is not furnished with respect to the intrastate operations of these carriers within Montana. Respondents state that the furnishing of such information would be virtually impossible.

As compared with 1929 the total operating revenue of these carriers in 1949 reflected an increase of $452,823,699 (54.81 percent). In the latter year, however, as compared with 1929, there were increases approximating $446,000,000 (77.1 percent) in operating expenses, and $74,000,000 (122 percent) in railway tax accruals. The net railway operating income in 1929 was $170,182,473 as compared with $90,852,208 in 1949, reflecting a decrease in the latter year of $79,330,265 (46.61 percent). The deficit that year from passenger operations approximated $169,000,000. For the first 9 months of 1949 and 1950 the total operating revenues of the class I carriers serving Montana were $951,681,116 and $989,051,996, respectively, reflecting an increase in the 1950 period of 3.93 percent over that for the same period in 1949. In these respective periods the total operating expenses were $776,429,007 and $754,176,988, the operating ratios were 81.58 and 76.45, and the net railway operating incomes were $53,380,857 and $86,159,009, reflecting an increase in the income for the latter year of 61.4 percent. In the first quarter of 1949, these carriers had an operating deficit of $5,804,995 as a result of unusually severe weather conditions in the areas served by them. In the second quarter of 1950 the total operating revenues of these carriers were about the same as those for the same period of 1949 even though during 1950 the rates were higher than in 1949. In 1950, however, the total operating expenses were only 97.73 percent of those for the same period of 1949. The operating ratios for the second quarter of 1949 and 1950 were 82.68 and 80.5, respectively. During the second quarter of 1950 the Korean hostilities developed. This caused an immediate increase in the volume of west-bound traffic resulting in total operating revenues greater by 12.59 percent

in the third quarter of that year than during the same period of 1949. The revenue from freight traffic alone reflected an increase over 1949 of 15.03 percent.

Materials and supplies normally constitute about 30 percent of a carrier's operating expenses. Using the prices in June 1940 as index 100, the prices for July 1950 were 198.7 for materials and supplies, including fuel. A substantial increase in these prices has been greatly intensified by the Korean hostilities.

The other major item of operating expenses, of which it constitutes about 60 percent, is the amount of wages paid employees. In 1940, class I carriers serving Montana paid employees an average straight-time hourly rate of 73 cents. That rate became $1.428 in 1949, an increase of 95.6 percent over the 1940 rate. In September 1949, the 40-hour 5-day week, to which approximately 72 percent of the carriers' employees are subject, became effective. On the basis of the actual 40-hour workweek the average straight time hourly rate is $1.548 reflecting an increase of 112.05 percent over the rate in effect in 1940. This rate did not include the 23-cent increase per hour granted to switchmen and yardmasters, in what is known as the "Steelman Agreement," and gave no consideration to recent demands for further wage increases made by all groups of railroad employees.

Intrastate operations and conditions.—When respondents were preparing to file the petition in this proceeding for increases in the intrastate rates in Montana to the extent that general increases were authorized for application on interstate traffic in Ex Parte Nos. 162, 166, and 168, a questionnaire, dated April 17, 1950, was issued to the several carriers serving Montana, in order to ascertain the amount of revenue losses being sustained by reason of the failure of the Montana commission to grant increases in the intrastate rates and charges in that State to the extent that increases were authorized by us in interstate rates and charges. In the questionnaire the carriers were requested to study the Montana intrastate traffic which terminated in the first month of each quarter of 1949, except on sugar beets for which the study was to be made for the last

4 months of that year. The study as to less-than-carload traffic was to include local movements only, namely, traffic moving wholly over the individual lines of these carriers.

On the basis of the returns to the questionnaire a study covering the operations of the carriers serving Montana [20] expanded to a full 12-month level was prepared. The study groups carload traffic into six classes, namely, products of agriculture; animals and products; products of mines; products of forests; manufactures and miscellaneous; and forwarder traffic. It indicates that because of the failure of the Montana commission to grant increases in the rates on intrastate traffic to the extent authorized by us in Ex Parte 162, 166, and 168 on interstate traffic, the total revenue loss on carload traffic, except forwarder traffic, for the 12-month period indicated, amounted to $643,729.58, and on less-than-carload traffic not including minimum rate and minimum charge shipments of $10,547.11, aggregating a revenue loss on all intrastate traffic, with the exception of forwarder carload traffic and minimum rate and minimum charge shipments of $654,276.69. The carload traffic consists of 130,857 shipments, aggregating 6,160,370 tons terminated in Montana. The study does not include any shipments of grain, livestock, and lumber which moved from a Montana origin to a known transit point on the assumption that eventually such shipments would move to an interstate destination. The revenue on such traffic approximated $1,500,000.

Subsequently a telegraphic questionnaire was issued to the carriers indicated for the purpose of procuring copies of all less-than-carload freight bills prepared at Montana destinations during the week, October 22-28, 1950. Freight bills covering interline traffic were furnished by all destination carriers. All bills thus furnished indicated whether or not delivery service was performed or an allowance given in lieu thereof. All such freight bills were segregated as to interstate and Montana intrastate traffic and, from the latter, bills had been selected which covered traffic that had moved either on a minimum charge, or on which de-

[20] As shown in footnote 2 *supra*.

livery service had been performed. The minimum rate shipments received during that week on which pickup and/or delivery had been performed, expanded to an entire year, indicated a loss of $8,969.04, incident to the failure of the Montana commission to grant increases in the rates and charges for these services to the extent authorized by us on interstate traffic in Ex Parte Nos. 162, 166, and 168. The amount indicated is apparently less than the actual amount, because it pertains only to shipments on which delivery service was performed, the number of shipments receiving pickup service not being ascertainable. The minimum charge on the less-than-carload shipments handled during the week indicated, expanded to a 12-month period, would result in revenue approximating $16,570 less than would accrue if the minimum charge on Montana intrastate shipments were increased to the extent authorized by us in the general rate increase proceedings. Incident to the refusal of the Montana commission to grant the same measure of increase in its intrastate rates and charges as had been authorized by us on interstate traffic, respondents state that they are incurring a loss approximating $700,000 a year. The estimated 12-month revenue loss on products of agriculture amounted to $115,463.78, of which $92,258.48 (approximately 90 percent) represents the loss incident to the intrastate rates applicable on sugar beets. The indicated loss on sugar beets does not, however, give consideration to the fact that certain rates on the traffic have been increased by the amounts authorized by us for application on interstate traffic.

As to whether the present intrastate rates in Montana are insufficient to cover the service performed, respondents have been unable to determine the cost of handling intrastate traffic. It is virtually impossible to separate the costs in the various States from the total cost incurred in handling all traffic. Increased costs are, however, as applicable in Montana as in any other place, and on the assumption that the relationship of the Montana intrastate rates to the interstate rates prior to the general rate increase proceedings was proper, the former should be increased to the same extent as the latter to maintain that relationship.

It was stipulated into the record that, generally speaking, intrastate traffic handled within Montana and interstate traffic irrespective of whether it be to, from, or through points in that State, are handled within Montana in the same trains and by the same crews, and that the carriers' station facilities within that State are available alike to the handling of intrastate and interstate traffic. In the loading, unloading, and line-haul movement no distinction is made between intrastate and interstate traffic. Actually, in the physical handling, both are inextricably commingled. A qualified witness for respondents testified that operating conditions on the Great Northern, Northern Pacific, and Milwaukee, the principal carriers traversing Montana, are substantially the same within, as to and from points in that State. No evidence to the contrary was offered.

Respondents report to the Montana commission their freight revenues on all traffic originated or terminated in, or moved through, Montana. They also show revenue prorated to the interstate shipments moving to, from, or through the State. There is, however, no separation of operating expenses on interstate as contrasted with intrastate traffic. The only expenses that are reported to the Montana commission are arrived at on an arbitrary basis and are filed solely because that body insists on such action.

In its report of February 11, 1947, in docket No. 3474, concerning increases requested by respondents pursuant to our findings in Ex Parte Nos. 148 and 162, the Montana commission stated:

Interstate and intrastate traffic is handled in the same trains and by the same employees and equipment. It is impossible to allocate a specific percentage of such costs to separate classes of traffic.

Therein the Montana commission found:

That the decrease in volume of traffic and increases in wages, payroll tax, costs of materials and supplies have resulted in greatly reducing the net operating revenue of all rail carriers. That such decreases and increases apply proportionally to intrastate and interstate traffic.

In its report of December 27, 1947, in docket No. 3565, concerning increases requested by respondents pursuant to our findings in Ex Parte No. 166, the Montana commission stated that:

Interstate and intrastate freight is handled by the same employees, uses the same equipment and is moved over the same property. It is thus impossible to arrive at a method of fair allocation of intrastate and interstate costs of operation. System figures show the financial conditions of the carriers.

And in its additional report of February 21, 1948, in docket No. 3565 (reopened) the Montana commission said:

As we have pointed out before, interstate and intrastate traffic is handled by the same employees and equipment and that a fair allocation is difficult to fix.

The Montana, Wyoming & Southern Railroad.—This carrier lies wholly within Carbon County, Mont. Its principal traffic is coal, from which the total revenue in 1949 was $111,557.82. Of this, $100,265.29 (89.89 percent) accrued from intrastate traffic, and $11,292.53 (10.11 percent) from interstate traffic. For the first 9 months of 1950 the respective revenue figures were $70,821.62, $65,038.84 (91.83 percent), and $5,782.78 (8.17 percent). The coal transported by this carrier originates at Bearcreek, Mont., and is shipped to numerous points in that State at rates per ton ranging from $2.33 to $5.43. If those rates had been increased to the extent authorized for application on interstate traffic they would range from $2.52 to $5.78. In 1949, this line also handled six carloads of livestock.

As indicated, intrastate traffic constitutes the great bulk of this carrier's operations. It contends that the action of the Montana commission in disallowing on intrastate traffic the general rate increases authorized for application on interstate traffic is prejudicial to it. Section 13 (4) of the act provides for relief only when the rates complained of are unduly prejudicial to or unjustly discriminatory against interstate commerce.

Class rates.—The present intrastate rates in Montana on the first four classes are on a truck-competitive basis. When

those rates were established by respondents, effective October 31, 1933, the carriers had not intended to provide pickup and delivery service. Effective October 7, 1935, however, because of truck competition which in the meantime had developed, those services were included in the rates indicated. There are both interstate and intrastate movements of traffic on rates classes one to four, inclusive. The present intrastate first-class rate between Billings and Helena, Mont., 238 miles, is $1.54. Under the 8-percent increase authorized for application on interstate traffic in Ex Parte No. 168, that rate would become $1.66, the rate sought by respondents, and would be lower than rates for like distances on interstate traffic to points in Montana. For example, the first-class rates are: From Bismarck, N. Dak., to Conlin, Mont., 235 miles, $2.41; from Sheridan, Wyo., to Springdale, Mont., 238 miles, $2.46; and from Spokane, Wash., to Missoula, Mont., 238 miles, $2.03. The present normal first-class rate between Billings and Helena, increased 8 percent as authorized in Ex Parte No. 168 on interstate traffic, is $1.93. It reflects the basis, generally termed the "Portland back-haul scale," prescribed by us in *Portland Chamber of Commerce* v. *Oregon R. & Nav. Co.*, 21 I. C. C. 640, for application from Tacoma and Seattle, Wash., and Portland, Oreg., to points in Washington, Oregon, Idaho, and Montana. The rate shown herein from Spokane to Missoula is on that basis. The rates from Bismarck to Conlin, and from Sheridan to Springdale are on the basis prescribed by us in *Great Falls Traffic Assn.* v. *Chicago, B. & Q. B. Co.*, 226 I. C. C. 467 and 235 I. C. C. 459, for application from western trunk-line and territories east thereof to eastern and central Montana.

On October 18, 1950, the Northern Pacific handled a shipment of 970 pounds of mattresses and box springs from Spokane to Missoula on which the first-class rate of $2.03 was charged. If a similar shipment were made from Billings to Helena, the rate would have been $1.54 and, if increased to reflect the increase authorized on interstate traffic, it would have been $1.66. That rate would be 37 cents lower than the rate from Spokane to Missoula for the same distance. On October 26, 1950, a shipment of

343 pounds of oil and automobile parts moved over the Northern Pacific from Glendive to Wibaux, Mont., 31 miles. A rate of 42 cents applied on 324 pounds, and 50 cents on the remaining 19 pounds. The charges aggregated $1.46. The Northern Pacific paid 44 cents for pickup at Glendive, and 30 cents for delivery at Wibaux, a total of 74 cents, leaving that carrier 72 cents. If the minimum interstate rate of 65 cents had applied, the total charge would have been $2.23, under which the net revenue to the Northern Pacific would have been $1.49. On October 24, 1950, a shipment of two boxes of window glass moved over the Northern Pacific from Missoula to Plains, Mont., 77 miles, at the minimum charge of 90 cents. The Northern Pacific paid 13.5 cents pickup service at Missoula and 10 cents for delivery at Plains, a total of 23.5 cents, leaving a net amount of 66.5 cents for that carrier.

Livestock.—In 1939 the live weight production of sheep and lambs in Montana amounted to 135,685,000 pounds as compared with 80,365,000 in 1949. For those respective years the total production value ranged from $8,419,000 to $13,823,000, and the value per pound from 6.2 to 17.2 cents. The cash income to Montana farmers from the sale of sheep and lambs and their dressed meat products was $7,765,000 in 1939 and $20,514,000 in 1949. During the first 10 months of 1950 the average price per pound received by Montana farmers ranged from 10 to 13.4 cents for sheep and from 21.2 to 24.4 cents for lambs. In 1939 the live weight production of hogs in Montana amounted to 49,295,000 pounds as compared with 62,405,000 pounds in 1949. In those respective years the total production value ranged from $3,106,000 to $11,550,000, the value per pound from 6.3 to 18.51 cents, and the cash income to Montana farmers from the sale of hogs, pork, and lard from $1,855,000 to $10,441,000. For the first 10 months of 1950 the average price per pound received by Montana farmers for hogs ranged from 15.1 to 19.6 cents. The live weight production of cattle and calves amounted to 265,400,000 pounds in 1939 as compared with 550,045,000 in 1949. In those years the respective total value was $18,269,000 and $104,178,000 for the entire product, and 6.88 and 18.94 cents per pound.

The cash income to the Montana farmer from the sale of cattle, calves, beef, and veal ranged from $15,469,000 in 1939 to $124,183,000 in 1949. In the first 10 months of 1950 the average price received by Montana farmers ranged from 19.5 to 24 cents for cattle, and from 21.4 to 28.1 for calves.

The total live weight production of meat animals in Montana was 450,380,000 pounds in 1939 as compared with 692,815,000 pounds in 1949. During those years the dressed weight products were 223,233,000 and 374,019,000 pounds, respectively. The consumption of meat in Montana during those respective years ranged from 73,705,000 to 74,340,000 pounds. The excess dressed weight production over consumption was 149,528,000 pounds in 1939, and 299,674,000 pounds in 1949. Because of its excess production over its local requirements, Montana has need of interstate transportation in disposing of its meat surplus as well as intrastate transportation for local movements.

The present rates on the principal livestock traffic within Montana, for distances of from 10 to 700 miles, range from 14 to 64 cents. Respondents seek to increase those rates to range from 17 to 76 cents, respectively, to reflect the general rate increases authorized by us for application on interstate traffic. The interstate rates for like distances prescribed in *Livestock, Western District Rates*, 176 I. C. C. 1, 188, for application in that general territory range from 18 to 79 cents. The present intrastate rates on livestock reflect the basic scale prescribed in that proceeding for the eastern part of Montana increased the full 15 percent pursuant to Ex Parte No. 162, and the first 10 percent pursuant to Ex Parte No. 166, with no increase pursuant to Ex Parte No. 168. Respondents seek to establish rates on this traffic which will reflect the 20 percent increase authorized in Ex Parte No. 166, and the 8 percent authorized in Ex Parte No. 168. For distances 10 to 700 miles the increases sought would range from 3 to 12 cents. Such increases will result, however, for the respective distances indicated, in rates lower than those for interstate application by amounts ranging from 1 to 3 cents. This difference results from the disallowance on Montana intrastate traffic

of the 5-percent increase authorized in Ex Parte No. 123, [21] for application on interstate traffic.

The present intrastate rate on fat cattle, in carloads, from Sidney, Mont., to Billings, 281 miles, is 41 cents as compared with a rate of 51 cents for interstate application in that territory generally for a like distance. Respondents seek to increase the present intrastate rate to 48 cents. From Lewiston to Great Falls, Mont., 118 miles, the present intrastate rate on fat cattle, in carloads, is 28 cents as compared with an interstate rate of 38 cents for the same distance in that territory generally. Respondents seek to increase the present intrastate rate to 32 cents. From Missoula to Spokane, Wash., 238 miles, the present rate on cattle, in carloads, is 51 cents as compared with an intrastate rate of 36 cents which respondents seek to increase to 43 cents for the same distance from Helena to Billings. From Gillette, Wyo., to Billings, 245 miles, the rate on cattle is 52 cents, as compared with an intrastate rate of 39 cents from Lewiston to Butte, Mont., 243 miles, which respondents seek to increase to 45 cents. From Sweet Grass, Mont., to Butte, 309 miles, the interstate rate on cattle originating at points in Canada is 57 cents as compared with an intrastate rate from and to the same points of 42 cents which respondents seek to increase to 50 cents. The foregoing examples typify the rate advantage intrastate shippers of livestock have over those whose shipments move interstate.

From 1940 to 1949, inclusive, the movement of cattle and calves originating at points in Montana to intrastate and interstate destinations ranged from 10,048 to 30,453 carloads, reflecting an increase in shipments during that period of over 200 percent. The movements are, however, subject to considerable fluctuation from year to year. A segregation of the movement as between intrastate and interstate traffic for the period indicated is not available. Out of 922 carloads of cattle and calves from points in Montana on the Great Northern and Northern Pacific in June 1950, and from points on the Milwaukee in September of that year, 163 moved to intrastate and 752 to interstate

[21] Fifteen Percent Case, 1937-1938, 226 I. C. C. 41 and 746.

destinations. Respondents take the position that the various general increases in rates have not diverted the livestock traffic to other forms of transportation and that the increases here sought will not result in any substantial diversion of such traffic.

In *Livestock, Western District Rates, supra,* rates on livestock were prescribed on a level which was not expected to do more than "pay its own way." We found therein that the livestock traffic could not sustain a rate level which would "produce more than the cost of rendering the service plus a minimum of profit." In view of the favorable condition which has existed in the livestock industry for the past several years, as well as the outlook for the future, respondents are of the opinion that the livestock traffic should contribute to the cost of transportation by paying on intrastate traffic the same measure of increases as have been authorized for application on interstate traffic. They contend that the continued withholding on Montana intrastate traffic of the general increases in rates authorized for application on interstate traffic will deprive them of revenue to which they are entitled, particularly with respect to livestock which moves in large volume from range to range for pasturing, and which motor-truck operators are not in a position to handle or consider unattractive. At certain times these movements consist of entire herds ranging from 10 to 50 carloads. In 1949 the Milwaukee handled almost 300 carloads of such traffic. There had been a diversion, however, in recent years from rail to motortruck for hauls of 200 miles or less into the sales yards, but not as to movements from range to range.

The present intrastate rates on livestock do not include the increases authorized in Ex Parte No. 123. The carriers received that increase on interstate traffic, but the Montana commission refused to grant it for intrastate application. The carriers made no further effort to procure that increase on Montana intrastate traffic on account of the fact that when it was authorized on interstate traffic conditions in the livestock industry were somewhat unfavorable. In the livestock adjustment we prescribed the mountain-Pacific scale for application in the western part of Montana, but the Montana commission prescribed the lower western

trunk-line scale for application throughout the entire State.

The Montana Stockgrowers Association, Inc., consisting of approximately 4,500 members engaged in the raising of cattle, opposes respondents proposal. In 1949, practically all of eastern and south central Montana suffered from a drought which continued from spring until early in the fall. Certain parts of the State were also infested with grasshoppers. That year a large volume of livestock was moved by rail from the drought-stricken area. There were, however, adequate rainfall and good pasturage in 1950. As a result the production of livestock increased. But the conditions caused by the curtailment of herds in 1949 were not fully recovered from in 1950.

A witness for this association contends that respondents furnish the livestock industry an inadequate supply of stock cars, and that the running time of the trains results in slow deliveries; that if the intrastate rates on livestock in 1949 had been as high as the interstate level, the livestock traffic would have been removed by truck; and that unless there is an improvement in the rail service any increase in intrastate freight rates will divert the livestock traffic to other modes of transportation. This individual did not ship livestock by rail during the drought period of 1949. And, because of his ability to sell in local markets within the State, he shipped none by rail in 1950. Owing to weather conditions, it is frequently necessary to move livestock from one locality to another within the State. The measure of the rates is the determining factor as to whether the movement is by rail or by truck. The movement of cattle from ranch to ranch is usually by rail.

A member of the Montana Livestock Commission, owner and operator of a cattle company, stated that about 80 percent of Montana cattle are sold in local markets. The greater portion of these cattle ultimately moves beyond under transit to interstate destinations. Stockmen desire to sell in the nearest market at a reasonable price. There are 12 public stockyard markets in Montana. This concern ships about 99 percent of its livestock to market by rail. It is contended, however, that if the rail rates are increased, as requested by respondents, the traffic may go to the trucks.

There was a decrease of 39 percent in the number of sheep raised in Montana in 1949 as compared with 1946. This was attributed to the fact that wool was "pegged" at too low a price in 1942 to make the cash return from sheep-raising commensurate with that from other lines of endeavor. As a result many sheep raisers engaged in the cattle business. The liquidation of livestock incident to the 1949 drought averaged 40 percent in approximately two-thirds of the eastern section of Montana. There have been intrastate shipments of sheep from 1946 through 1950. The cost of the operation usually determines whether sheep will move by rail or by truck. More than 94 percent of the sheep received at Billings in 1949 moved by truck as compared with 44.2 percent of the total receipts trucked into livestock market throughout the United States. Of the cattle and calves received at that point in 1949, 44.2 and 47.5 percent, respectively, moved by truck as compared with 71.7 and 74.7 percent, respectively, into livestock markets throughout the country. The record establishes that almost every producer of livestock in Montana owns and uses trucks to haul his product to market. Moreover, trucks hauling ordinary livestock are exempted from regulation by the Montana commission.

Farm crops, general.—Montana produces numerous farm crops of which wheat, barley, and sugar beets are the most important. From 1939 to 1949, inclusive, the production in bushels ranged from 51,473,000 to 64,080,000 for wheat, from 5,088,000 to 12,052,000 for barley, and in net tons from 894,000 to 690,000 for sugar beets. During that period the price per bushel ranged from 62 to 186 cents for wheat, from 37 to 92 cents for barley, and from $4.82 to $9.90 per ton for sugar beets. The total farm value during that period ranged from $31,913,000 to $119,189,000 for wheat, from $1,883,000 to $11,088,000 for barley, and for the years 1939 to 1948, inclusive, from $4,309,000 to $6,653,000 for sugar beets. The value of sugar beets in 1949 was not available at the time of the hearing herein. The average price for sugar beets in 1947 and 1948 does not include Government payments approximating $2.45 per ton.

The present intrastate rate on feed, in carloads, from Great Falls to Glasgow, Mont., 276.2 miles, is 37 cents, as

compared with a rate of 54 cents to the same point from Minot, N. Dak., 277.1 miles. From and to these respective points the rates on flour are 38.5 and 54 cents. Respondents propose to increase the present intrastate rates of 37 and 38.5 cents to 40 and 41.5 cents, respectively. There is a movement of feed and flour from and to those points.

The present intrastate rates on wheat between points in Montana for distances of from 5 to 600 miles range from 6.5 to 50 cents. Respondents propose to increase those rates to amounts ranging from 7 to 54 cents. The rates for interstate application to and from points in Montana for similar distances range from 7 to 64.5 cents. For distances ranging from 50 to 600 miles the present interstate rates would exceed by from 1 to 10.5 cents the intrastate rates even if increased to the extent here sought. The major portion of Montana grain moves to interstate destinations.

In *Grain and Grain Products,* 205 I. C. C. 301, 473, 474, we said:

> It will be assumed that not only generally in the interest of substantial equality among all shippers, but in accordance with the spirit of cooperation every effort will be made by the State commissions to achieve the maximum of uniformity in interstate and intrastate levels. • • •

Sugar beets.—There are sugar factories at Billings, Hardin, Missoula, Sidney, and Chinook, Mont., to which sugar beets move from certain adjacent areas in Montana, Wyoming, and North Dakota. All movement of such traffic to Billings, Missoula, and Chinook are intrastate. Those to Hardin and Sidney are both intrastate and interstate. The interstate shipments to the former originate at points in Wyoming. But the interstate shipments to Sidney originate at points in North Dakota, and at points in Montana on the Great Northern from which the route to Sidney traverses a small portion of North Dakota. In 1949 the interstate movements of sugar beets to Sidney and Hardin were 44,000 and 22,000 tons, respectively, in cars averaging 50 tons each.

The Holly Sugar Corporation operates a sugar factory at Sidney served by the Northern Pacific and Great North-

ern. It operates a similar factory at Hardin served by the Burlington. In 1949, 1,273 car loads (77,907 tons) of sugar beets were shipped intrastate to Sidney from 11 points in the Sidney area for distances ranging from 8 to 183 miles at rates per ton ranging from 8 to 158 cents. The preponderance of the shipments originated at points 55 miles and less from Sidney. The weighted average rate per ton was 83.6 cents, and the total gross revenue $65,130. Under respondents' proposal the gross revenue would be increased approximately $12,245. Of the movement of sugar beets to Sidney the Northern Pacific handled intrastate from points on its line 1,006 carloads in 1947, 1,231 in 1948, and 1,169 in 1949. In the latter year, 1,097 carloads of this traffic including 86 carloads from Ludington Beet Siding, Mont., moved to Sidney from points on the Great Northern.

From Ludington Beet Siding to Sidney, 8.8 miles, the present intrastate rate per ton is 32 cents as compared with interstate rates of 52, 59, and 59 cents to that point from East Fairview and Dore, N. Dak., and Stateline, Mont., for distances of 11.2, 15.6, and 19.5 miles, respectively. The interstate rates include the authorized general increases for application on interstate traffic, whereas the intrastate rate includes only a 10-percent increase pursuant to Ex Parte No. 166, with no increase under Ex Parte No. 168. Respondents seek to increase the rate from Ludington Beet Siding to Sidney from 32 to 38 cents to reflect the increase authorized in the general increased rate proceedings for application on interstate traffic.

In 1949, 794 carloads (36,826 tons) of sugar beets moved to Hardin from 5 points in that factory area for distances ranging from 7 to 34 miles on rates per ton ranging from 32 to 64 cents, except from Dunmore, Mont., from which a minimum charge of $15 per car applied. The weighted average rate per ton for an average distance of 11.7 miles was 35.67 cents with total gross revenue of $13,136. Under respondents' proposal the gross revenue would be increased $2,471. That year, 2,500 carloads of sugar beets moved from Hathaway, Miles City, Sheffield, Thurlow, Kinsey, and Carterville, Mont., to Hardin. The intrastate rates on that traffic, published to expire January 31, 1951,

included all the general rate increases authorized for application on interstate traffic.

The American Crystal Sugar Company owns and operates a sugar beet factory at Missoula, and eight additional factories in five other western States. During 1949, 1,261 carloads (61,505 tons) of sugar beets were shipped intrastate to Missoula from 14 points in that factory area for distances ranging from 17 to 164 miles on rates ranging from 44 to 179 cents per ton. Total charges aggregated $46,303 which would be increased $8,705 under the rates sought. Operations at the Missoula factory in 1949 were subnormal. In a normal year the proposed increase in aggregate charges would approximate $18,000. Under the present rates based on weighted averages the rate per ton is 75.28 cents, with earnings of 77.28 cents per car-mile and 15.81 mills per ton-mile, for an average distance of 47.51 miles.

The Utah-Idaho Sugar Company operates eight sugar factories in Utah, Idaho, South Dakota, Washington, and Montana. Its factory in Montana is at Chinook. It requests us to exempt the Montana intrastate rates on sugar beets from the second 10-percent increase in Ex Parte No. 166, and from the entire increase in Ex Parte No. 168, authorized for application on interstate traffic. During the 1949 season, 1,556 carloads (62,555 tons) of sugar beets were shipped intrastate to Chinook from 14 points in that factory area for distances ranging from 15 to 177 miles at rates ranging from 44 to 178 cents, aggregating total charges of $66,532. Under the rates sought those charges would be increased by 12,507 to $79,039. On a weighted average the present rate per ton is 106.4 cents, with earnings of $42.76 per car, 49.5 cents per car-mile and 12.3 mills per ton-mile, based on an average load of 40.2 tons per car, for an average distance of 86.4 miles.

From 1945 to 1950 the sugar beet area harvested in the Chinook district decreased from 14,799 to 7,683 acres and the quantity of beets produced decreased from 145,563 to 77,800 tons. The area under sugar beet production in Montana decreased from 81,000 acres in 1945 to 59,000 in 1949. During those years the yield per acre ranged from 9.7 to 10.8 tons in the Chinook district as compared with from

10.7 to 12.2 tons in Montana and from 12.1 to 14.8 tons throughout the United States. The decrease in the production of sugar beets in Montana occurred during the period that freight rates were being increased.

The Great Western Sugar Company operates a sugar factory at Billings. During the last 4 months of 1949, 5,236 carloads (264,787 tons) of sugar beets were shipped to Billings from 33 points in that factory area for distances ranging from 4.8 to 141.8 miles, on rates ranging from 32 to 143 cents per ton. Under the present intrastate rates the freight charges totaled $165,027.86, which under the rates sought would be increased by $31,025.26. On a weighted-average basis the earnings under the present rates for an average haul of 31.1 miles would be 101.35 cents per car-mile and 19.82 mills per ton-mile. In 1949, 4,572 carloads of sugar beets moved to Billings from points on the Northern Pacific in Montana for distances ranging from 5 to 91 miles on rates ranging from 32 to 114 cents per ton, which are also the present intrastate rates. Those rates, if increased, as sought, to the extent authorized by us for application on interstate traffic, would range from 38 to 135 cents. From points on its line in Montana to Billings, the Northern Pacific handled 4,422 carloads of sugar beets in 1946, 4,567 in 1947, and 3,686 in 1948.

The present Montana intrastate distance scale rates on sugar beets, in carloads, for distances of from 5 to 500 miles range from 32 to 398 cents per ton. These rates, if increased to the extent authorized in Ex Parte Nos. 166 and 168, would range from 38 to 469 cents. Respondents are of the opinion that the increases sought will not result in diverting any carload traffic to other modes of transportation but admitted that there might be such a diversion of a small portion of less-than-carload traffic.

During 1949, the Great Western Sugar Company, Holly Sugar Corporation, American Crystal Sugar Company, and Utah-Idaho Company shipped to their factories in Montana 10,120 carloads (503,579 tons) of sugar beets on which the freight charges at the present rates were $356,129 with weighted-average earnings of $49.19 per car, 82.48 cents per car-mile, and 16.59 mills per ton-mile, for an average distance of 42.6 miles, based on an average weight of 49.76

tons per car. Under the rates sought, the aggregate charges on this traffic would be increased by $66,952.

In handling sugar beets the railroads assign certain numbers of cars to the various sugar beet factories. At the beginning of the 1950 season the Northern Pacific assigned 325 cars to Billings, 200 to Missoula, and 129 to Sidney. An undisclosed number of cars was also assigned to Hardin. These cars are generally furnished with racks, and ordinarily, move empty from the factory to the loading point. Furnishing cars for the sugar-beet movement requires the withdrawal at certain times of such equipment from coal and lumber movements.

During the past 10 years there has been a tendency to reduce the number of beet receiving stations, by eliminating a few stations where the acreage under beet production had been substantially reduced, but particularly by consolidating beet deliveries by farmers to one station where previously the traffic had been delivered to two or more. In such instances pilers have usually been installed to facilitate delivery of the crop by the farmer. The growers deliver the sugar beets at the railroad loading points (beet dumps,) where the sugar manufacturers take delivery. From those points the beets are shipped to the factories where they are to be processed. The sugar companies pay and bear the freight charges on the beets thus shipped by rail. Sugar beets move from the loading points to the factories in multiple carlots. Beets moved into the Billings factory are principally in trainloads with the minimum amount of switching at that point. Empty cars also move in trainloads from that factory.

Wet beet pulp.—From Sidney to Dore, 15.6 miles, the rate per car on wet beet pulp, which includes the general increases authorized for application on interstate traffic, is $15.66 as compared with an intrastate rate from the same point to Hoffmanville, Mont., 15.5 miles, of $13.80 which does not reflect the increases authorized for application on interstate traffic. Respondents seek to increase the intrastate rate to $14.90 per car.

Dry beet pulp.—The present rates on dry beet pulp, in carloads, from Missoula to Spokane and Plaza, Wash., 257 and 286 miles, respectively, are 43 and 49 cents as com-

pared with an intrastate rate from Missoula to Bozeman, Mont., 215 miles, of 24 cents which respondents seek to increase to 26 cents to reflect the increase authorized in Ex Parte No. 168 for application on interstate traffic.

Limerock.—Limerock used in the manufacture of sugar is shipped to Montana factories from Frannie and Sheridan, Wyo., and Warren, Bradman, and Calcium, Mont. Limerock used in the manufacture of beet sugar is of a high calcium content. It loads to the maximum capacity of the car, ranging from 100,000 to 120,000 pounds. It is not susceptible to loss or damage. The intrastate rates from the Montana origins do not reflect the increases authorized in Ex Parte No. 168 for interstate application. In 1949, 536 carloads (29,789 tons) of limerock were shipped from Warren, Calcium, and Bradman Spur to the Montana sugar factories at rates ranging from $1.14 to $2.95 per ton. The total freight charges were $57,896, with weighted-average earnings of $108.01 per car, 67.4 cents per car-mile, and 12 mills per ton-mile, based on an average of 55.58 tons per car for a weighted average distance of 162 miles. Under the rates sought the charges would be increased $4,642 to a total of $62,528.

Beet sugar molasses.—In 1949, the Sidney factory produced 7,480 tons of beet sugar final molasses in the processing of 166,000 tons of beets. When a sugar factory equipped with a Steffens process, such as the one at Billings, is located favorably from a rate standpoint to a non-Steffens process factory, such as the one at Sidney, the molasses may be shipped for further processing from the latter to the former. From each ton of molasses thus processed about 700 pounds of sugar are recovered. In 1949, 4,462 tons of molasses were shipped from Sidney and Missoula to Billings and Hardin for further refining, at rates raging from $3.24 to $4.10 per ton, aggregating freight charges of $15,520. The weighted-average earnings based on an average weight of 53.76 tons for a weighted-average distance of 303.78 miles were $186.99 per car, 61.44 cents per car-mile, and 11.45 mills per ton-mile. Those figures do not include 16 carloads of molasses from Chinook to Billings. If those shipments had been included, the total charges would have been $19,088 which, under the rates

sought, would have been increased $1,527 to $20,615. That year, 825.9 tons of molasses were shipped for further processing from Chinook to Billings, 379.5 miles, on a rate of $4.32 per ton. The total charges were $3,567.89 resulting in average earnings of $222.99 per car, 58.8 cents per car-mile, and 11.4 mills per ton-mile. Under the rates sought the total charges would be increased by $285.43, aggregating $3,853.32. Molasses, in carloads, moved from the Utah-Idaho Sugar Company at Chinook to itself at Idaho Falls, Idaho, 529 miles, at a rate per ton of $6.46 as compared with intrastate rates of $3.24, $3.73, and $4.32, respectively, from Sidney, Missoula, and Chinook to Billings for respective distances of 281, 355, and 380 miles. Respondents seek to increase those intrastate rates to $3.50, $4.03, and $4.67, respectively, to reflect the increase authorized in the rates on interstate traffic in Ex Parte No. 168.

Protestant sugar companies.—The protesting sugar interests take the position that the intrastate rates on sugar beets, limerock, and beet sugar final molasses should not be increased as sought by respondents. They point out that in 1949 the ton-mile revenue in mills to the railroads operating in Montana was 12 on limerock, 11.5 on molasses, and 16.6 on sugar beets, as compared with an average on all traffic of 12.8 in the northwestern region, 12 on the Great Northern, 12.6 on the Northern Pacific, and 12.4 in all districts throughout the United States; that the weighted-average revenue per ton-mile on sugar beets, limerock, and molasses in Montana in 1949 was 15.5 mills for a weighted-average haul of 51.4 miles; and that the weighted-average haul of the Great Northern, and Northern Pacific on sugar beets in Montana was 42.6 miles, as compared with average hauls on all traffic of 238.8 miles in the northwestern region, 291.6 miles on the Great Northern, 401 miles on the Northern Pacific, and 227.8 miles throughout the United States.

Protestants were of the opinion that the favorable method of handling sugar beets largely compensated for the difference between the 42.6-mile haul on that commodity and the 296.1 to 401-mile hauls on commodities generally. It is their further opinion that the ton-mile revenue accruing

from intrastate shipments of sugar beets, limerock, and molasses is equal to or greater than like revenue from the movement of all commodities throughout the United States and in the western district; and that as a result the Montana intrastate rates on these commodities place no undue burden on interstate commerce. Comparison of the earnings on sugar beets, limerock, and molasses for short hauls, such as those instanced by the protesting sugar interests, with those for average hauls ranging from 296.1 to 401 miles on all commodities has no probative value.

The amount paid for the beets by the sugar companies does not depend upon the measure of the freight rates. Rates are only one of the costs given consideration in making contracts with the farmers for the purchase of their beets. All growers in a particular factory area receive the same contract price. Thus farmers at points in North Dakota in the Sidney area would receive the same price as Montana intrastate shippers in that area. Similarly Wyoming farmers in the Hardin area would receive the same price as Montana farmers in that area. Freight rates have, however, an influence on the price the sugar companies pay the growers in any factory area irrespective of whether the traffic moves intrastate or interstate. Even if the growers in the several factory areas were accorded the level of the intrastate rates, it would not necessarily result in higher prices to them for their beets. Either the grower or the sugar company will, however, be affected by the increases sought if granted. But such increases will not affect one grower as compared with another in the same sugar factory area.

Generally speaking, the Montana sugar companies supply the same general market in the territory (Twin Cities and east thereof) where they compete with cane sugar producers and with one another. On traffic to that territory the factories at Billings, Missoula, and Chinook receive all their beets on intrastate rates which reflect only a 10-percent increase pursuant to Ex Parte No. 166 with no increase pursuant to Ex Parte No. 168, as compared with the factories at Sidney and Hardin which receive beets from intrastate and interstate origins. The rates from the latter include the full increases authorized for

application on interstate traffic. In the 1947-48 processing season, 2,524,421 one hundred-pound bags of sugar were produced in Montana, of which only 385,000 bags were consumed within that State, leaving 2,139,421 bags to be shipped to the interstate consuming area and sold in competition with sugar transported to the Chicago area from New Orleans at low barge-line rates, or imposed through the eastern ports.

Coal.—Coal, in carloads, moves from points in Utah, Wyoming, and Montana to destinations in the latter State. The intrastate rates on that commodity between points in Montana have not been increased as authorized in Ex Parte No. 168 for application on interstate traffic, whereas the rates on coal to the same Montana destinations from points in Wyoming and Utah, and from Bearcreek to Clark's Fork, Idaho, reflect the increases authorized in that proceeding. From Bearcreek to Clark's Ford, 559 miles, rates per ton of $5.18 and $4.91 apply on lump and slack coal, respectively, as compared with respective rates of $4.83 and $4.56 on those commodities from that origin point to Heron, Mont., 545 miles. Respondents seek to increase those rates to the same level as the rates to Clark's Fork. Heron and Clark's Fork are in close proximity at the Montana-Idaho State line. Prior to the increase authorized in Ex Parte No. 168 the rates to these points from Bearcreek were on the same basis.

From Roundup to Dillon, Mont., 326 miles, the present rates per ton on lump and slack coal, respectively, are $4.30 and $4.06 as compared with respective rates to that point of $4.80 and $4.44 from Rock Springs, Wyo., 553 miles, and $5.10 and $4.76 from Hiawatha, Utah, 507 miles. Respondents seek to establish rates from Roundup to Dillon of $4.64 and $4.38, respectively, to reflect the increase authorized on interstate traffic. From Roundup to Montline, N. Dak., 264 miles, the rate per ton on coal of all kinds is $4.09 as compared with intrastate rates from Roundup to Kingmont, Mont., 255 miles, of $2.90 on slack coal and $3.29 on coal other than slack. Respondents seek to increase these intrastate rates to $3.13 and $3.55, respectively. From Roundup to Kingmont the interstate rate per ton on coal (all kinds) is $3.72. On the basis of 110

percent of the Holmes and Hallowell scale,[22] prescribed for application from Roundup to destinations west of Mobridge, S. Dak., in *Northwestern Ret. Coal Deal. Assn. v. C., M. & St. P. Ry. Co.*, 178 I. C. C. 751, the interstate rate for 255 miles would be $4.02.

From Roundup to Adair, Idaho, 491 miles, the rates on slack coal and coal other than slack are $4.91 and $5.18, respectively, as compared with intrastate rates of $4.41 and $4.83 from that point to Bryson, Mont., 480 miles. Respondents seek to increase the intrastate rates to $4.76 and $5.18. A witness for the Milwaukee takes the position that the present intrastate rates on coal between points in Montana indicate a substantial discrimination against interstate traffic. The record establishes that receivers of interstate coal at points in North Dakota and Idaho are paying relatively higher rates than the receivers of intrastate coal in Montana.

During the first 9 months of 1950 the Milwaukee moved 1,965 carloads of coal to points in Montana from Roundup. In that period the movement of coal from that point to destinations in North Dakota, South Dakota, Minnesota, Idaho, and Washington consisted of 1,299 carloads, of which 1,097 carloads moved to destinations in North Dakota and South Dakota. Out of a total of 3,264 carloads of coal from Roundup to intrastate and interstate destinations, almost one-third moved to destinations in the Dakotas to which, distances considered, the interstate rates were higher than those for intrastate application. It is contended that the requested increases, if granted, will have the effect of reducing the present alleged preference and prejudice incident to the lower rates on intrastate traffic.

Cement.—There is a regular movement of cement, in carloads, from Trident, Mont., and Irvin, Wash., to destinations in Montana. The movement from Trident to Montana destinations is over intrastate routes. The following table shows the distances, the present intrastate rates on cement, and the rates sought by respondents to Montana destina-

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[22] *Holmes & Tallowell Co. v. Great Northern Ry. Co.*, 60 I. C. C. 687 and 69 I. C. C. 11.

tions as compared with rates to the same and other destinations from interstate points.

From—	To—	Distance	Rates	
			Present	Sought
		Miles	*Cents*	*Cents*
Trident, Mont.	Polson, Mont.	265	30	32
Irvin, Wash.	do	238	31	..
Trident, Mont.	Coram, Mont.	423	36	39
Metaline Falls, Wash.	do	311	36	..
Irvin, Wash.	do	291	35	..
Trident, Mont.	Browning, Mont.	322	33	36
Metaline Falls, Wash.	do	383	39	..
Trident, Mont.	Urbana, Mont.	427	38	39
Do	Beach, N. Dak.	437	41	..
Do	Warren, Mont.	186	28	30
Do	Frannie, Wyo.	192	30	..
Do	Dodge, Mont.	431	38	41
Do	Montline, N. Dak.	435	41	..

The Spokane Portland Cement Company operates a cement plant at Irvin, served by the Northern Pacific and the Spokane International Railroad. This company considers western Montana a part of its trade territory. From 1946 to and including the first 9 months of 1950, the shipments of cement from the Irvin plant to destinations in western Montana ranged from 6,908.5 to 2,799 barrels of 380 pounds each. The volume shipped reflected a continuous decline. This is attributed to the lower level of intrastate rates to the same destinations from Trident. For example, from Irvin to Plains, Perma, and Polson, Mont., 172, 192 and 238 miles, respectively, the rates are 28, 30, and 31 cents as compared with rates from Trident of 30, 29, and 30 cents for respective distances of 264, 245, and 265 miles. The rates from Trident, if increased to the extent sought by respondents, would be 32, 31, and 32 cents, respectively.

Freight rates are an important factor in the sale and distribution of cement. The establishment on Montana intrastate traffic of the general increases authorized on interstate traffic would aid the producer at Irvin to regain business which it is gradually losing at points on the Northern Pacific in western Montana. There is a slight movement of cement from Irvin to western Montana by truck.

Ideal Cement Company protestant produces cement lime, plaster, gypsum rock, and other products at numerous

points including Trident and Hanover, Mont. Hanover ships crushed gypsum rock to Trident, and to cement mills located west of Montana. Its shipments move in intrastate and interstate commerce. The in-bound materials such as coal, paper bags, grinding balls, firebrick and machinery, with the exception of coal which originates in Montana, move from interstate points. For 600 miles the intrastate rate on cement to points within Montana is 42 cents, with earnings, based on a minimum loading of 90,000 pounds, of 63 cents per car-mile, and 14 mills per ton-mile. In September 1950, this company shipped from Trident 127,000 barrels of cement, of which 31,675 moved by truck to 31 destinations in Montana. This company takes the position that the present intrastate rates within Montana are already unreasonably high and should not be further increased.

Ores and concentrates.—Ores and concentrates, in carloads, move from points in Idaho and Montana to East Helena, Mont. From Clark's Fork to East Helena, 288.3 miles, the present rates, which reflect the authorized general rate increases on these commodities having a value of $25 and $100 per ton, are $4.82 and $6.89, respectively, as compared with intrastate rates to the same destinations from Heron, 274.6 miles, of $4.16 and $5.50. Respondents seek to increase these rates to $4.94 and $5.94 to reflect the increases authorized in Ex Parte No. 168 for application on interstate traffic. From Mullan, Wallace, Morning, Dorn, Burke, and Bunn, Idaho, to East Helena, for distances ranging from 251.9 to 265.6 miles, the present rates on these commodities are $4.60 and $7.11 as compared with the intrastate rates of $4.16 and $5.50 to the same destination from Lookout, Mont., 240 miles, which respondents seek to increase to $4.49 and $5.94, respectively.

Interveners supporting respondents.—The Pacific Inland Tariff Bureau, representing motor carriers in Pacific Northwest territory which includes a substantial area in western Montana, adduced evidence in support of respondents. Its members haul commodities generally (not including bulk petroleum in tank cars). This concern had also petitioned the Montana commission for increases in the motor-carrier intrastate rates similar to those sought herein. The

petition was denied. The members of this bureau have increased the rates applicable on interstate traffic, including those to and from points in Montana, to the extent authorized for application on such traffic.

Petroleum and petroleum products.—Husky Refining Company also intervened in support of respondents. This company refines petroleum products at its plant at Cody, Wyo. The refined products approximate 70 percent heavy residual oils, including asphalt, and 30 percent gasoline and other light oils. Because of the sparsity of population and lack of industrial development in the vicinity of Cody, the heavy oils are shipped to the more densely and highly industrialized sections east thereof. The majority of these heavy oil products are marketed at points in Minnesota. The gasoline and light oils are marketed almost exclusively in Wyoming and Montana, the preponderance of which moves to the latter State. In the sale of gasoline and light oils the Cody refinery is in keen competition with refineries located at points in those States.

There are petroleum refineries at points in Montana such as Billings, East Billings, Laurel, Conrad, Great Falls, and other points. There are also refineries at points in Wyoming other than Cody such as Glenrock, Thermopolis, Newcastle, Lovell, Zube, Cheyenne, and Sinclair.

The short-route rail distances from refineries in Montana to destinations in that State are substantially less than the average distances to the same destinations from Cody, Lovell, and Zube, located in northern Wyoming. The rates from Montana points are also substantially lower than those from the identified Wyoming points. For example, from Laurel to Butte, 221 miles, the rate on gasoline and light oils is 28 cents which if increased as sought by respondents would become 30 cents, as compared with 41 cents to the same destination from Cody, Lovell, and Zube, for an average distance of 302 miles. The present rates from the Wyoming points to Butte exceed by 13 cents those from Laurel. If, however, the rate from Laurel were increased as authorized in Ex Parte No. 168 for application on interstate traffic, the amount by which the rate from northern Wyoming points to Butte would exceed the rate to that point from Laurel would be reduced to

11 cents. In other words, the refineries at Cody, Lovell, and Zube, in competing at Butte with the Laurel refinery are compelled to absorb 2 cents more than they would be required to absorb if the rate from Laurel reflected the increase authorized for application on interstate traffic.

In the sale of gasoline at points in Montana, the refinery at Cody must absorb the difference between the rates from that point and those in effect from Laurel to meet the competitive delivered price. Hence the Cody refiner is at a competitive disadvantage as compared with Laurel in the amounts the rates from the former exceed those from the latter. This disadvantage is further increased to the extent that the intrastate rates in Montana do not include general rate increases the same as those authorized for application on interstate traffic.

In 1948, 4,935,615 gallons of gasoline from Casper, Wyo., and 2,092,359 gallons from Glenrock moved to points in Montana by rail. For the first 4 months of 1949 the respective amounts were 1,060,060 and 1,415,153 gallons. In 1948, the Cody refinery sold 21,196,640 gallons of gasoline, of which 16,404,026 gallons (77.39 percent) moved to points in Montana. Of the shipments to Montana, 9,184,438 gallons moved by rail. At points in Montana the prices of the Montana and Cody products are the same.

From Laurel to Glacier Park, Mont., 396 miles, the rate on gasoline is 49 cents which respondents seek to increase to 53 cents as compared with a rate of 68 cents to that point from Cody, Lovell, and Zube for an average distance of 478 miles. Under the present rates the Wyoming refineries absorb 19 cents in competing with Laurel at Glacier Park. This exceeds by 4 cents the amount to be absorbed if the intrastate rate from Laurel had been increased to the extent authorized for interstate application.

The present intrastate rates on gasoline and other light oils from Laurel to Forsyth and Miles City, Mont., for distances of 117 and 162 miles, are 14 and 19 cents, respectively, which respondents seek to increase to 15 and 21 cents, as compared with interstate rates of 18 and 26 cents, from Zube to Reed Point and Hysham, Mont., for respective distances of 114 and 161 miles. Even under the increases sought the intrastate rates will substantially lower than

the basis prescribed in *Mountain-Pacific Oil Cases,* 192 I. C. C. 599, as subsequently increased. In *Rates on Petroleum and Its Products in Montana,* 176 I. C. C. 707, decided July 13, 1931, we prescribed the same basic scale of rates on petroleum and petroleum products intrastate in Montana as interstate to points in that State from Cody and other points in Wyoming.

Prior to the increase authorized in Ex Parte No. 168 for application on interstate traffic, the intrastate rate on gasoline from Billings to Butte was 29 cents, which is also the present rate. That rate if increased to the extent authorized for interstate application would become 31 cents. From Cody to Butte the rate in effect prior to Ex Parte No. 168 was 38 cents, which was 9 cents greater than the intrastate rate from Billings. At present the interstate rate from Cody is 41 cents, thus increasing to 12 cents the disadvantage of the shipper at that point as compared with the shipper at Billings.

The rate on gasoline from Billings to Missoula prior to the decision in Ex Parte No. 168 was 45 cents, and is also the present rate. By applying the increase authorized in that proceeding for application on interstate traffic that rate would become 49 cents. From Cody to Missoula the rate in effect prior to Ex Parte No. 168 was 54 cents, reflecting a rate disadvantage to the shipper at Cody as compared with the shipper at Billings of 9 cents. At present the rate from Cody is 58 cents, thus increasing to 13 cents the rate disadvantage to the shipper at that point as compared with the shipper at Billings.

An oil refinery at East Billings, with a capacity of processing 20,000 barrels of crude oil each day, utilizes crude oil produced in Montana and Wyoming. It products are marketed in Montana and other States. Transportation costs determine the extent of the area in which its products can be marketed economically. It is feared that the proposed increases might result in narrowing the marketing area of this producer. Its shipments to points in Montana over a period of a year indicate that respondents' proposal would have resulted in increasing the charges on those shipments by approximately $14,000. It is contended the in-

creases sought will, if granted, divert traffic to motor trucks.

Asphalt.—The present intrastate rate on asphalt, in carloads, from Great Falls to Libby, Mont., 367 miles, is 58 cents, which respondents seek to increase to 63 cents, as compared with an interstate rate of 80 cents to that point from Zube, 664 miles. The present interstate rate from Zube and the intrastate rate sought from Great Falls are on the basis of the scale prescribed for application on this commodity in *Mountain-Pacific Oil Cases, supra.* The present intrastate rates in Montana on this commodity do not reflect the increase authorized in Ex Part No. 169 for application on interstate traffic.

Logs and lumber.—The intrastate rates on logs to sawmills in Montana are lower than the interstate rates on that traffic to mills in Idaho and Washington. This accords the mills in Montana an advantage over those in the other States indicated in shipping lumber to points in the East and South. In June 1950 there was an intrastate rail movement of 1,327 carloads of logs between points in Montana, and an interstate movement of 453 carloads of like traffic to sawmills at Spokane and at points in Idaho. For distances ranging from 10 to 150 miles the Montana scale of rates on logs per 1,000 board feet ranges from $2.26 to $4.85 which respondents propose to increase to amounts ranging from $2.44 to $5.24, respectively. The present Idaho intrastate scale ranges from $2.36 to $5.56, and the present interstate scale from $2.67 to $6.29 for the same respective distances. These scale rates, under which there is an actual movement, are applicable where specific point to point rates have not been established. The present intrastate rate on sawlogs per 1,000 board feet from Plains to Missoula, 76.6 miles, is $3.83, which respondents seek to increase to $4.14, as compared with an interstate rate of $4.82 on the same commodity from St. Maries, Idaho, to Spokane, 60.6 miles. From Troy to Reserve, Mont., 701.1 miles, the present intrastate rate on lumber, in carloads, is 65 cents, which respondents propose to increase to 70 cents as compared with a rate of 71 cents from that point to Williston, N. Dak., 700.2 miles. From Troy to Stanford, Mont., 454.3 miles, the rate is 43 cents, which respond-

ents seek to increase to 50 cents the same as the rate to that point from Bonner's Ferry, Idaho, 485.4 miles.

Lumber is shipped from various mills in competition with one another to interstate destinations. For example, mills in Montana, Idaho, and eastern Washington ship to St. Paul, Minn., Chicago, Ill., St. Louis, Mo., and points east and south thereof on rates which are the same from all points of origin.

Evidence for the Montana commission.—Montana, the third largest State in the Union, from the standpoint of area, has a population of only 587,196 according to the 1950 census, or 4.01 persons per square mile. In 1944, 418,052 carloads of various commodities originated at points in Montana, as compared with 247,903 carloads in 1949, and 241,542 for the first 9 months of 1950. Except in 1947 there was a continuous decrease in the number of shipments. On behalf of the Montana commission it is contended that the decrease in the volume of traffic has resulted from the general increases in rates.

The Montana commission states that it is fully cognizant of what we have said in prior proceedings relative to increasing rates on a percentage and flat, or certain amount, method. It takes the position, however, that the subject is of such importance to Montana that it is again constrained to place the matter before us despite our prior views on the subject. It points out that Montana is in the position of having to obtain virtually all of its manufactured goods in the Middle West, in the territory east thereof, and along the Pacific coast; that its products such as grain, livestock, and metals must be shipped to the markets from which it obtains manufactured goods; and that all of these commodities move on the present increased interstate rates generally applicable to long-haul transportation ranging from 650 to 2,400 miles and averaging about 1,200 miles. It contends that the percentage method of increasing rates and charges creates an undue burden on traffic to and from the State of Montana; that many users of railroad freight service in Montana who are competitive with producers of similar types of merchandise in other States may be forced out of business if the increases sought by respondents are granted; and that Montana users

of freight service are already paying all they can afford and still be able to continue in business.

Illustrative of the effect of the percentage increases in rates on traffic to Montana, it is pointed out that on June 30, 1946, the first-class rates from New York, N. Y., to Fargo, N. Dak., and Butte, were 295 and 537 cents, respectively, reflecting a difference o. 243 cents by which the latter exceeded the former. As modified by the subsequently authorized general increases those rates became 491 and 897 cents, respectively, on September 1, 1949, reflecting a difference of 406 cents, the amount by which the rate to Butte exceeded the rate to Fargo. The respective distances from New York to Fargo and Butte approximate 1,421 and 2,240 miles. On June 30, 1946, the first-class rate of 395 cents from Chicago to Butte exceeded the first-class rate of 198 cents from that point to Fargo by 197 cents. As subsequently increased, the first-class rates on September 1, 1949, from Chicago to Butte and Fargo became 659 and 331 cents, respectively, the rate to the former exceeding that to the latter by 328 cents. From Chicago to Butte and Fargo the distances approximate 631 and 1,435 miles. On July 1, 1935, the rates on grain and grain products to Minneapolis, Minn., from Jamestown, N. Dak., 334 miles, and from Great Falls, 1,017 miles, were 19.5 and 42 cents, respectively, reflecting a differential of 22.5 cents by which the rate from the latter exceeded the rate from the former. As subsequently increased the rates on September 1, 1949, to Minneapolis from these respective origins became 30 and 65 cents, reflecting a differential of 35 cents by which the rate from Great Falls exceeds the rate from Jamestown.

The Montana commission realizes that the measure of interstate rates has already been determined and therefore not in issue in this proceeding. It takes the position, however, that where the majority of its intrastate traffic is for distribution after a prior interstate movement or for shipment in interstate commerce after processing, the effect of increases in interstate rates on a percentage basis has been disadvantageous to business in Montana; and that the holding down of the intrastate rates to the extent ac-

complished by its orders is the only manner in which this disadvantage can in part be offset.

Additional evidence for protestants.—Several shipper witnesses adduced testimony in opposition to respondents' proposal. A member of the Montana Farmers Union, interested principally in family sized farms, took the position that increases in rates as sought herein will make it more difficult for such farms to operate economically. Producers of strawberries near West Glacier, Mont., who ship their product principally to points in eastern Montana contend that an increase in rates as sought will enable producers of strawberries at points east of Montana to compete with them in eastern Montana markets. A coffee roasting plant at Butte opposes the increase sought in the minimum rate. Its witness takes the position that if such increase is authorized respondents will lose traffic, with resultant loss of revenue, in that consignees of shipments on which the minimum rate applies will seek sources of supply other than Butte. In 1940 this concern could ship a 60-pound carton of coffee from Butte to Helena for 28 cents and 100 pounds for 31 cents. The present rate is 44 cents subject to a minimum charge of 90 cents.

The Columbia Paint Company with a plant at Helena contends that it is under a disadvantage in procuring raw materials as compared with competitors in other States. Its shipments average in excess of 50,000 pounds of paint each month. It takes the position that with this volume of traffic it could buy a carload of paint each month at Chicago from which the rate would be on the basis of 27 cents a gallon as compared with the charge of from 26 to 27 cents on the raw materials (including the container) necessary to make a gallon of paint. Approximately 90 percent of this company's sales are to customers who purchase in small quantities, 95 percent of whom are in Montana.

A wholesaler of cigars, cigarettes, candy, and similar products, with offices at Butte and Great Falls, takes the position that the increases sought in Montana intrastate rates would be prejudicial to the people and businesses of that State. This protestant has approximately 2,000 accounts, of which about 500 are in Butte and Great Falls. It uses common-carrier service to make delivery to cus-

tomers beyond those points. Because of the nature of its merchandise, it makes numerous shipments, many of which weigh from 30 to 60 pounds, on which the present intrastate minimum charge applies. It contends that, if the minimum charge is increased, it will be forced either to discontinue prepaying shipments or to increase its base prices; and that either method would place an additional burden on the retailer, in that the resale prices on these products have been established on a Nation-wide basis.

A wholesaler and distributor of drugs and related articles at Butte opposes principally the proposed minimum charge. Approximately 50 percent of its shipments, the preponderance of which are shipped by motor carrier, weigh less than 50 pounds each. It is apprehensive that if the increases sought are granted, the motor carriers will immediately seek similar increases in their rates and charges. This concern makes about 10 shipments daily, approximately 70 pounds each, by rail.

The Butte Development Association supports the Montana commission in its denial of the prior requests of respondents to increase their intrastate freight rates and charges to the extent authorized for application on interstate traffic. It takes the position that the increases sought will, if granted, be passed on to the consuming public in the form of increased prices.

At present the Montana Horse Products Company, with a plant at Butte, secures nearly 48 percent of its horses for slaughter by rail from local points in Montana. This protestant contends that, if the intrastate rates are increased as sought, less than 1 percent of those animals will move by rail. Certain horse-slaughtering companies with operating plants at points outside Montana, such as Rockford, Ill., buy horses in Montana in competition with companies in that State. Such animals are shipped from points in Montana on the present interstate rates which reflect the authorized general rate increases.

The intrastate rates on horses, mules, and burros, hereinafter collectively termed horses, for joint-line hauls within Montana are the combinations of the local rates. The only rates on horses for joint-line intrastate application within that State are named between points on the Butte, Anaconda

& Pacific, and points on the Milwaukee, Great Northern, Northern Pacific, and Union Pacific. As those rates exceed the rates for interstate application for like distances from points in Montana prescribed in *Oklahoma Horse & Mule Comm. Co.* v. *A. T. & S. F. Ry Co.*, 243 I. C. C. 495 and 248 I. C. C. 161, they will not be further increased in this proceeding.

Meat packers, distributors of canned pet food, and others at Butte take the position that the proposed increases in the minimum charge and minimum rate will not materially increase respondents' revenue but will, if authorized, work to the advantage of the motor carriers in Montana, which at present handle more than 95 percent of the less-than-carload intrastate shipments. They contend that any increase in the minimum rate and minimum charge will result in prejudice and discrimination against trading areas, merchants, and Montana industries.

The Billings Traffic Bureau objects to percentage increases in rates. It takes the position that any increases which may be granted in the intrastate rates between points in Montana should provide that the relationship of rates between western trunk-line territory and Montana should be restored to the basis prevailing prior to January 1, 1947. Several concerns at Billings engaged in wholesale drug, grocery, meat-packing, livestock, and steel-fabrication operations oppose the increases sought in Montana intrastate rates. A concern at that point fabricates steel and distributes it throughout Montana, Wyoming, Idaho, and Washington. Its total volume of in-bound steel approximated 4,000,000 pounds in 1950, of which 65 percent was reshipped after fabrication to points in Montana by rail. The remainder moved by motortruck. A wholesale distributor at Billings, 99 percent of whose shipments moves intrastate to points in Montana by motortruck, opposes principally the proposed increase in the minimum rate and in the minimum charge.

The Missoula Mercantile Company, with wholesale and retail operations at Missoula, opposes the proposed increases only to the extent that they apply to the minimum rate and the minimum charge. It will be noted, however, that while it does not oppose the proposed increase of 8

percent on intrastate traffic incident to the authorization of a similar increase for application on interstate traffic, it does not specifically approve of it. Since the minimum rate in connection with pickup and delivery has been increased to 42 cents, approximately one-half of this company's shipments have moved in its own trucks. Such shipments would not be affected by the proposed increases in intrastate rates.

On January 15, 1947, the Missoula Mercantile Company opposed respondents' application to the Montana commission to increase from 22 to 50 cents the intrastate rate in connection with which pickup and delivery service was performed. This protestant is interested only in the rates and charges on less-than-carload traffic. It takes the position that the increases sought will, if granted, disrupt the current distribution of merchandise throughout Montana as to which pickup and delivery is performed. This company also owns and operates two similar concerns at Kalispell, Mont. It receives a large volume of carload traffic of manufactured goods from practically all parts of the United States. It distributes from its warehouses at Missoula to points within a radius of 100 miles thereof in Montana. Its operations are similar to those of numerous similar concerns located throughout the State.

For many years the manufactured goods needed in Montana have been shipped in carload lots from points of production to wholesalers located at certain points in Montana, where the goods are warehoused and later distributed to retailers and consumers. The Missoula Mercantile Company owns and operates 6 warehouses with capacities ranging from 10 to 100 carloads each at distances of from one-half to 6 city blocks from the Northern Pacific freight stations at those points. It contends that pickup and delivery service at points in Montana, for short hauls as indicated above, is performed over uncongested well-paved streets and highways, and that the cost of this service should not be measured by the conditions prevailing in densely populated States and crowded cities where pickup and delivery service necessitates long hauls through heavy traffic, which frequently causes long delays. It further contends that the economies effected by the abandonment of local rail freight

service at certain points in Montana by the Great Northern and Northern Pacific and the substitution in lieu thereof of highway trucking organization is to the advantage of those carriers both in service and cost. This protestant takes the position that respondents' proposal will, if granted, injuriously dislocate the long-established relationships between business concerns and communities in Montana thus creating State-wide discriminatory situations and business discontent.

The Great Falls Chamber of Commerce having a membership of 870, of whom 147 ship or receive intrastate freight, opposes the increases sought in intrastate rates. Great Falls, located in north central Montana, is served by the Great Northern and Milwaukee. It is the primary distributing point for stable commodities for an area approximately 150 miles north, 300 miles east, 200 miles west, and 100 miles south thereof. Wholesalers, jobbers, and retailers in the Great Falls area are in competition with like operators in Williston, Sheridan, and Spokane. Practically all freight, except flour, cement, and lumber, forwarded in less-than-carload lots from Great Falls to points in Montana, moves into that State in carload lots, as does all freight received at Williston and Sheridan. Great Falls is farther than are those other points from the eastern manufacturing points. Hence the in-bound carload rates to Great Falls exceed those from the same eastern points to the competitive points instanced. The several general rate increases authorized during the past few years have resulted in greater amounts of increases to Great Falls than to Williston and Sheridan. Interests at Great Falls take the position that if the minimum charge is increased it should be a reasonable amount such as 10 percent, under which the charge would become $1.

The Montana Chamber of Commerce, a State-wide organization comprising 1,300 business, industrial, and agricultural leaders, the Montana Creameries Association, the Montana Milk Distributors Association, the Equity Supply Company, the Montana Hardware and Implement Association, and others, also oppose the increases sought in Montana intrastate rates.

Passenger deficits.—Protestants take the position that

the low rate of return on respondents' investment, as hereinbefore indicated, has been caused principally by the deficits in their passenger operations. In the latest report in Ex Parte No. 168, wherein the subject of such deficits was discussed at length (276 I. C. C. 32 *et seq.*), we said that we felt compelled in a general rate case to take such deficits into account in the adjustment of freight rates and charges, in that both the freight and passenger services are essential. That action was taken, however, without prejudice to subsequent examination of the question upon complaint or in an investigation by us. It was therein stated that the passenger business may not be excused from contributing the greatest possible earnings consonant with adequate service and reasonable charges; and that the carriers must exert every legitimate effort to place that branch of their operations on a more compensatory basis. The record does not establish, however, that passenger deficits on respondents' entire systems are relatively greater than those sustained on Montana intrastate operations.

Revenue needs of respondents.—In authorizing increases in Ex Parte Nos. 162, 166, and 168, the conclusions reached were based upon the need of the railroads generally, including respondents herein, for additional revenue to enable them to meet increased operating expenses, including increased wages of employees, the so-called payroll tax, and increased costs of materials and supplies. Respondents take the position that the general increases authorized in those proceedings on interstate traffic will, when applied to Montana intrastate traffic, result in rates not in excess of reasonable maxima, and will not cause any substantial amount of traffic to be diverted to other forms of transportation. They also take the position that rates and charges increased as sought will produce revenue necessary to enable them to maintain in the public interest adequate and efficient railroad transportation service at the lowest cost consistent with the furnishing of such service, as declared by Congress in the national transportation policy and in section 15a (2) of the act.

Our power to require an increase in intrastate rates and charges depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet

maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate. Respondents are here seeking to secure from Montana intrastate freight traffic, a contribution to maintenance and operating costs, including taxes, more nearly proportionate to the contribution thereto made prior to the increases in Ex Parte Nos. 162, 166, and 168. We may properly use such prior contribution as a valid criterion of fairness, in the light of which the Montana intrastate rates and charges in 1947 to 1950, inclusive, afforded a disproportionately small share of the revenue required to meet the costs of the service in Montana. See *Increases in Florida Intrastate Rates*, 278 I. C. C. 41, 67.

In *Florida* v. *United States*, 282 U. S. 194, 211, the Supreme Court of the United States, in holding that our power to establish intrastate rates in order to remove unjust discrimination against interstate commerce is not open to dispute, said:

The authority granted by section 13 (4) is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to maintain an adequate national railway system.

As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay "a fair proportionate share" of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it.

The findings in Ex Parte Nos. 162, 166, and 168 authorizing increases in interstate rates and charges indicate that like increases ought to be made in intrastate rates and charges including those within Montana. Respondents have sought from the Montana commission increases in Montana intrastate rates and charges to the extent increases were authorized generally on interstate traffic. By reason, how-

ever, of the refusal of that commission to authorize increases in intrastate rates and charges to the extent authorized generally by us on interstate traffic, shippers and receivers of Montana intrastate traffic are not bearing their just and proper proportion of the national transportation burden.

The proportionate percentage of each individual class of traffic moving intrastate and interstate is not shown. Nevertheless, where, as is the case here, the intrastate and the interstate traffic, as a whole, moves under substantially similar conditions, and the expense of handling the two classes of traffic is inextricably woven together, an attempt to do the impossible, namely to show costs of intrastate service segregated from interstate costs, would serve no useful purpose. See *Florida* v. *United States*, 292 U. S. 1, 9; *Illinois Commerce Commission* v. *United States*, 292 U. S. 474; *Increases in Alabama Freight Rates and Charges*, 274 I. C. C. 439, 463. We find nothing to the contrary in *North Carolina* v. *United States*, 325 U. S. 507.

A substantial disparity in favor of Montana exists in rates and charges on commodities moving intrastate in Montana, as compared with rates and charges on the same commodities when moving in interstate or foreign commerce. This results in an undue burden upon interstate commerce, and causes undue preference of certain persons and localities in Montana in intrastate commerce, and undue prejudice to certain persons and localities in interstate or foreign commerce. The record establishes that the unit cost of handling Montana intrastate traffic approximates the cost of handling interstate traffic to, from, or through that State.

Respondents are not seeking increases in rates or charges where they are now published as not subject to the increases authorized in Ex Parte Nos. 162, 166, and 168 on interstate traffic.

Findings and conclusions.—Upon the record in this proceeding we find and conclude:

1. That the transportation conditions incident to the intrastate transportation of freight in Montana are not more

favorable than those between Montana and interstate points.

2. That the present interstate freight rates and charges between points in Montana and points in other States are just and reasonable; and that intrastate rates and charges herein approved will not exceed a just and reasonable level.

3. That there is active competition between persons and localities engaged in interstate commerce between points in Montana and points in other Western and Northwestern States, on the one hand, and persons and localities engaged in intrastate commerce in Montana, on the other hand, and that this competition extends throughout the entire State of Montana and to class and commodity traffic.

4. That the Montana intrastate rates and charges, except certain rates on sugar beets which include the increases authorized in Ex Parte Nos. 162, 166, and 168 on interstate traffic as indicated herein, and the rates for joint-line application on horses, between points in Montana are not contributing their fair share to the revenues required by respondents to enable them to render adequate and efficient service and to operate profitably, and thereby accomplish the purpose of the Interstate Commerce Act, and as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the commerce of the United States, of the postal service, and of the national defense; and that the burden thus cast upon interstate commerce is undue to the extent that these intrastate rates and charges are less than they would be on the basis herein approved.

5. That the establishment of intrastate rates and charges increased sufficiently to equal the level herein approved will substantially increase respondents' revenues by more than $600,000 and will constitute not more than a fair proportion of respondents' total income.

6. That the maintenance of intrastate rates and charges within Montana on bases lower than those herein approved causes, and in the future will cause, unjust discrimination against interstate commerce, undue preference of and advantage to certain persons and localities in intrastate commerce, and undue prejudice and disadvantage to certain persons and localities in interstate commerce.

7. That this unjust discrimination and undue preference and prejudice should be removed by establishing intrastate rates and charges between points in Montana, except on sugar beets and horses as shown in finding 4, which will reflect the same increases as are, and for the future may be, maintained by respondents on like interstate traffic to and from points in Montana under our authorization in Ex Parte Nos. 162, 166, and 168.

These findings are without prejudice to the right of the authorities of the State of Montana, or any other interested party, to apply for a modification thereof as to any specific intrastate rates or charges on the ground that they are not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

The motions by the Montana commission to deny respondents' petition and to dismiss this proceeding are overruled.

An order carrying into effect the foregoing findings will be entered, unless we are notified by the Montana commission, within 30 days from the date of service of this report, that it will permit promptly the increases herein approved.

COMMISSIONER SPLAWN did not participate in the disposition of this proceeding.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION

Filed July 24, 1952. H. H. Walker, Clerk, by —— —— Deputy Clerk.

No. 586

STATE OF MONTANA, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA AND PAUL T. SMITH, LEONARD C. YOUNG AND AUSTIN B. MIDDLETON, AS MEMBERS OF AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, *Plaintiffs,*

and

AMERICAN CRYSTAL SUGAR COMPANY, THE GREAT WESTERN SUGAR COMPANY AND HOLLY SUGAR CORPORATION, THE MONTANA STOCKGROWERS ASSOCIATION, A CORPORATION, AND THE MONTANA WOOLGROWERS ASSOCIATION, A VOLUNTARY ASSOCIATION, *Intervening Plaintiffs,*

vs.

UNITED STATES OF AMERICA, *Defendant,*

and

INTERSTATE COMMERCE COMMISSION, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY AND CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Intervening Defendants*

Before POPE, *Circuit Judge,* and PRAY, *Chief Judge,* and MURRAY, *District Judges.*

Per CURIAM:

This is a proceeding under the provisions of Title 28, U.S.C., Sections 2321-2325, brought on the petition of the State of Montana and the Board of Railroad Commissioners

thereof against the United States of America, seeking an injunction restraining the enforcement and operation of an order of the Interstate Commerce Commission authorizing the railroads mentioned in the order to establish and place in effect intrastate rates in Montana which will reflect in general an 8 per cent increase over those approved and permitted by the Board of Railroad Commissioners of the State of Montana for such intrastate traffic.

The proceedings before the Interstate Commerce Commission, here referred to as the Commission, which preceded those in which the order now under attack was made, the railroads operating in the State of Montana with other similar carriers were granted permission to establish a series of general increases in interstate rates. These were granted by the Commission in order to meet increased costs of materials, supplies, wages and other items entering into operating costs, which in general resulted from post-war inflationary trends. In Ex Parte 162, 266 I.C.C. 537, decided December 5, 1946, an increase of 20 per cent in interstate rates in western territory, which includes Montana, was granted, subject to qualifications not here material. In Ex Parte 166, 270 I.C.C. 81, decided December 27, 1947, the Commission granted a further interstate increase of 20 per cent. Following each of these increases, the railroads operating in Montana made application to the Board of Railroad Commissioners of the State of Montana, herein referred to as the Board, for like increases intrastate. Following the Ex Parte 162 order of the Commission, the Board granted like increases intrastate with minor exceptions. Similarly following the Commission's order in Ex Parte 166, the Board granted a corresponding increase as to interstate commerce except that as to sugar beets and livestock it limited the authorized increase to one of 10 per cent.

Thereafter on August 2, 1949, in a proceeding known as Ex Parte 168, the Commission granted a further increase in rates in interstate traffic in western territory of 8 per cent. These rates became effective September 1, 1949. Upon application to the Board for corresponding increases on intrastate traffic the Board refused to permit the increases. This refusal was followed by proceedings before

the Commission instituted September 22, 1950, seeking an order from the Commission under Section 13 (4) of the Transportation Act of 1940 that intrastate rates in Montana be increased by the percentage authorized as to interstate rates, by the Commission in the earlier proceedings mentioned. The order there sought was granted and that is the order here in question.

The opinion and findings of the Commission, upon which its order is based, listed numerous instances of what the Commission found to be unjust discriminations between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand. These instances thus listed by the Commission in the opinion which accompanies its findings, although considerable in number and although sufficient to warrant appropriate orders by the Commission increasing the particular intrastate rates which produced the unfair discrepancy, as the Commission is empowered to do under the Doctrine of the Shrevesport Case, 234 U.S. 342, do not in our opinion support or warrant the order here in question, which "includes (rates) between all interior points although neither may be near the border and the (rates) between them may not work a discrimination against interstate (commerce) at all." *Wisconsin R.R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563. There is evidence in the Commission's report that it recognized this limitation, for it expressly recited that its power to require the broad increase here ordered must be predicated upon other grounds, saying:

> "Our power to require an increase in intrastate rates and charges depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate."

The State and the Board, while not questioning the power of the Commission to make an order requiring a state wide increase of intrastate rates in the circumstances stated in the quotation just made, say that the order here

before us is invalid because the findings upon which it is based do not measure up to the "high standard of certainty" required in respect to such orders. North Carolina *v.* United States, 325 U. S. 507, 511. It is contended that there was no evidence to show that the intrastate rates must be increased 8 per cent or any other percent before such traffic will contribute "its fair share of the revenue required to enabled respondents to render adequate and efficient transportation service." The State also urges that the findings lack a determination in this respect and says that before the Commission may make the necessary fundamental finding as to whether a fair share is being contributed, it must make inquiry into the costs of the intrastate commerce within Montana in relation to the state revenue and the costs and revenue from the entire system of each railroad. The Commission found that the segregation of such costs of handling intrastate traffic was impossible; that they could not be determined or segregated from the total cost incurred in handling all traffic.[23] The Commission arrived at its conclusion that the same 8 per cent increase must be added to the intrastate rates in order to bring them to the point where they would produce their fair share of the required revenue, by stating:

> "Increased costs are, however, as applicable in Montana as in any other place, *and on the assumption that the relationship of the Montana intrastate rates to the interstate rates prior to the general rate increase proceedings was proper,* the former should *be increased* to the same extent as the latter to maintain that relationship." (Emphasis added)

The State and the Board assert that the Commission may not properly make any such assumption. They say that this assumed proper relationship of intrastate and inter-

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[23] The report which accompanied the findings recited:

> "As to whether the present intrastate rates in Montana are insufficient to cover the service performed respondents have been unable to determine the cost of handling intrastate traffic. It is virtually impossible to separate the costs in the various States from the total cost incurred in handling all traffic."

state rates prior to any of these increases is a matter of proof and of finding. The contention is that for aught that appears here, the intrastate rates which antedated any of these increases may have been disproportionately high, and that the effect of the last interstate increase may have operated to do no more than bring the two sets of rates into a just proportion.

A like question arose under very similar circumstances in the case of State of Montana *v.* United States (1933) 2 Fed. Supp. 448, in which a three-Judge court, sitting in this district, was asked to enjoin an order increasing intrastate freight rates under circumstances very similar to those presented here. The opinion in that case expressly approved an assumption identical with that here drawn in question, and sustained the order there under attack. The Court said:

> "By reason of the presumption of regularity in official duty theretofore performed, it is to be assumed, even as it is unquestioned, that at the time of interstate increase ordered interstate rates and intrastate rates were in just relationship, a harmonious whole, each contributing its fair proportion of total revenues in discharge of their common obligation to adequately maintain the railroads and service in common used by interstate and intrastate commerce."

In respect to the particular argument here discussed, if the law now applicable be the same as that at the time of the decision of the case just cited, we would be constrained to follow that decision and to consider it dispositive of the point mentioned for the reason that the judgment in that case was affirmed by the Supreme Court, per curiam, in Montana *v.* United States, 290 U. S. 593. Other decisions rendered about the same time would seem to indicate that in the situation in which the Commission here found itself it was unnecessary to segregate and separate intrastate and interstate costs and revenues where it appears that the conditions under which interstate and intrastate traffic moved are substantially the same with respect to all factors bearing on the reasonableness of the rate and the two classes are shown to be intimately bound together. Illinois

Commerce Comm'n *v.* U. S., 292 U. S. 474, 483. Here the Commission has made findings, which we must accept, that the intrastate traffic and the interstate traffic are handled within Montana in the same trains, by the same crews and with the same facilities and that in the physical handling both are inextricably commingled. It found that both types of traffic moved under substantially similar conditions and the expense of handling the two classes is inextricably woven together. It found that an attempt to do the impossible, namely to show costs of intrastate service segregated from interstate costs, would serve no useful purpose.

These findings would appear to require a conclusion such as that arrived at in Illinois Commerce Comm'n *v.* U. S., supra, and in the three-Judge court decision from which quotation has been made, unless it can be said, as the plaintiffs here contend, that a different rule and a higher standard for findings upon this point is called for by what was said by the Supreme Court in North Carolina *v.* United States, supra.

In its discussion of the rules applicable to cases of this character, the Supreme Court in that case pointed out, clearly and emphatically, that since in a case of this character the Commission was moving into the field of intrastate transportation, which is primarily the concern of the State:

> "A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet 'a high standard of certainty', Illinois Central R. Co v. Public Utilities Commission, 245 U. S. 493, 510. Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear.' • • • The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intrastate rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission."

What was said in that case, coupled with the argument here, that the findings of the Commission now before us are as deficient as those which brought condemnation of the order in the North Carolina case has caused us much concern. The State argues that all we have here in addition to what appeared in the findings in the North Carolina case is an assumption which has no relation to any facts in evidence. The State says that the Commission's findings disclose on their face that the prior relationship of the two classes of rates is merely assumed and not proven to have been right and proper.

We are constrained to hold that the North Carolina case did not undertake to change the law as it theretofore existed or to increase the requirements as to the Commission's findings. In the first place the language of the Court bears no evidence of an intent to establish a new rule. Furthermore, so far as this particular point is concerned, there were facts in that case which differ from the facts which were before the three-Judge court in State of Montana v. United States, previously cited. In the North Carolina case, it was pointed out that there was reasonable doubt as to whether the Commission had ever fixed as the only reasonable interstate rate the rate which was sought to be established intrastate. The Court dwelt at length upon the manner in which the Commission had authorized a charge of 2.2 cents per mile, but without a hearing or evidence or finding that the railroads needed this increase. These circumstances alone were sufficient to disclose the absence of a basis for the order relating to an intrastate carriage. Furthermore, the Court pointed out that at the time of the order under attack former deficits of the North Carolina railroads had been transformed by very large revenue increases into very substantial profits. The Court said that this showed that had the Commission made any findings on the subject at all, it might properly have found that a much lower rate would have produced a fair intrastate contribution to revenues.

We think that it is obvious that in the circumstances of this case, where segregation of intrastate costs is found to be impossible, there would be no way in which the Com-

mission could exercise its statutory power to make an order which will require intrastate rates to contribute their fair share toward the revenue required to maintain an efficient railroad system, if the method and procedure adopted by the Commission in this case is not permissible. We do not think that anything said in the North Carolina case could have been intended to have the effect of requiring an impossibility.

We are also impressed with the argument made on behalf of the Commission that the "just relationship" of interstate and intrastate rates mentioned in the opinion of Judge Bourquin in the three-Judge case previously cited may not only be supported by the presumption there mentioned, but that an inference to like effect may be drawn from the fact that for a considerable number of years intrastate rates subject to continuous regulation by the Board and interstate rates subject to continuous regulation by the Commission shook down and fell into a relationship each to the other, which was the result of both action and non-action by shippers, Board and Commission.

In may be argued that if this assumption is to be made in all such cases, then there is no purpose in the Act's requirement of a hearing. If an increase in interstate rates percentagewise is always to be followed by a similar increase in intrastate rates, what remains to be heard? We think that the answer is that the presumption mentioned by Judge Bourquin and the inference from lapse of time to which we have referred is sufficient in the circumstances of practical impossibility to produce evidence of local costs sufficient to make a prima facie showing in respect to which the Board and the objecting shippers had an opportunity to offer evidence to the contrary,—if, for example, they were able to disclose that the prior intrastate rates were already disproportionately high. We think that in this connection we should say what the Supreme Court said in the somewhat different case of United States v. Louisiana, 290 U. S. 70, at page 79:

> "The case of the Louisiana rates was not alone before the Commission, and it should not be treated as though it were. A number of other states, contesting

in the aggregate a wide range of rates, were heard at the same time. Had the Commission been required to go into the circumstances of each item with particularity the purpose of its original order would have been defeated. *It sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable;* and that it saved the rights of interested parties to test the reasonableness of any individual rate." (Emphasis added.)

Here we think it sufficed that the Commission's report and findings disclose that Montana showed nothing in the circumstances relating to its prior intrastate rates so different from interstate rates as to lead to the conclusion that raising the intrastate rates in the same proportion as that applied to the interstate increase would be unreasonable or would not operate to bring about the result of securing a fair share of the required revenue from the local rates. We see no reason therefore for a departure from the views expressed in the three-Judge court case previously cited.

Our examination of the record in other respects has led us to grave doubt as to the sufficiency of the findings in another particular. As was said in the North Carolina case, supra, the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates (325 U. S. at page 516), and the standard for the Commission's determination in a case of this kind is not whether the intrastate traffic is contributing its fair share of the railroads' total revenue—the question is whether it is contributing its fair share "of the revenue required to enable respondents to render adequate and efficient transportation service."

In the North Carolina case, one of the defects in the Commission's findings was that "it made no finding as to what amount of revenue was required to enable these railroads to operate efficiently", We have examined the volum-

inous record before us with all the care and diligence which the time allowed has permitted us to exercise and we must say that it now appears to us that the same deficiency exists in the findings attached to the order here under review. Undoubtedly the Commission properly took official notice in this hearing of its findings and order in Ex Parte 168, which immediately preceded the proceedings here under review. Davis on Administrative Law, 1951, Sec. 155, page 508. We have examined the order, findings and report in that matter in 276 I. C. C. 9. It is there found, or it may be inferred therefrom, that an increase in interstate rates of 8 per cent is required to produce sums sufficient to permit railroads within the western territory, which includes Montana, to procure the required amount of revenue. The statement is "the anticipated revenue from the increases in rates and charges herein authorized and found to be just and reasonable is necessary to aid petitioners in meeting these outlays." There follows the order for the 8 per cent increase in interstate rates. The record of those proceedings appears to us to be devoid of any statement or finding to the effect that the 8 per cent will be sufficient on the assumption that a like increase be procured thereafter in respect to intrastate rates. We find no statement of the total amount required for the maintenance of the necessary adequate services and the payment of a reasonable rate on the investment anywhere in that record, nor can we discover figures from which we might calculate for ourselves and determine whether the Commission intended to find that there was required an 8 per cent increase on interstate rates in addition to a contemplated or any increase on intrastate rates. If the Commission intended any such conclusion, it most successfully refrained from disclosing it in writing. The Commission is not without experience in these matters and presumably had in mind that in its order referred to in Illinois Commerce Comm'n v. U. S., supra, at page 478, it had expressed its contemplation that the state commissions would bring intrastate rates into harmony with the interstate rates it prescribed. There one would find reason for an inference that the interstate

rates prescribed were fixed at the rates allowed in contemplation of the procuring of like increases intrastate. We find no such help in the record here mentioned. Here the Commission has made no finding that when the interstate increases are collected the railroads will still be short of the required revenues whatever those may be. If, as these proceedings suggest, the interstate increase will take care of the unstated required amount, then an appropriate adjustment of the whole matter would appear to be not that required by this order, but rather a lowering of the interstate rates there fixed accompanied by an appropriate increase of the intrastate rates which then would result in an over-all across the board increase of something less than 8 per cent.

Nor does the order, findings and report now under review supply the missing facts or findings. Under the heading of "Respondents' property, investment and revenues," the report gives numerous figures as to the property investment of the Class I railroads serving Montana, ranging from 1929 to 1949. Also given are the rates of return for the same periods showing a rate for 1949 substantially less than that predicted for the western territory railroads in Ex Parte 169 for that year, but this is followed by a statement that in the first quarter of 1949 these carriers had an operating deficit in excess of $5,000,000 as a result of unusually severe weather conditions in the areas served by them. It appears that in 1950, with the opening of Korean hostilities, operating revenues considerably increased. This portion of the report gives the deficit for 1949 in passenger operations, but gives us no assistance as to how this figure may be incorporated into a calculation which the Commission neglected to make for itself. The report states that as a result of questionnaires received from the carriers, it can conclude that due to the failure of the Montana Commission to grant the increases requested there has been a "total revenue loss" approximating $700,000 a year. The context shows that the loss here referred to is not an actual loss, but only a loss in the sense that it represents amounts which the carriers might have collected in addition to their actual collections had the requested intrastate increases been permitted. The Commis-

sion report, commenting on the arguments of the respondents in the proceeding before the Commission said:

> "They also take the position that rates and charges increased as sought will produce revenue necessary to enable them to maintain in the public interest adequate and efficient railroad transportation service at the lowest cost consistent with the furnishing of such service, as declared by Congress in the national transportation policy and in section 15a (2) of the act."

This does no more than to show that the respondents appreciated the questions involved in the proceeding, but it is not a finding by the Commission. The utmost extent to which the report and findings appear to go is in the statement:

> "The findings in Ex Parte Nos. 162, 166 and 168 authorizing increase in interstate rates and charges indicate that like increases ought to be made in intrastate rates and charges including those within Montana."

We are well informed by the Commission's order itself that it thinks these increases "ought to be made". But as stated in the North Carolina case, they cannot be made unless the Commission by appropriate findings based on evidence states *why* they ought to be made.

Before concluding we wish to add to the comments previously made with respect to the apparent insufficiency of the findings that we have noted that in its formal finding No. 4, the Commission stated that the Montana intrastate rates and charges "are not contributing their fair share to the revenues required by respondents to enable them to render adequate and efficient service and to operate profitably." This is precisely the conclusion reached by the Commission in the North Carolina case and is in large part in precisely the same language quoted by the Supreme Court at page 514 of 325 U. S., but this general conclusion of the Commission leaves us in the same predicament in which the Supreme Court found itself in that case. As the Supreme Court there said:

> "This conclusion of the Commission, if based on findings supported by evidence, would justify its order."

The difficulty there was the same as our difficulty here, which is that so far we have been unable to discover such findings.[24]

If we had had adequate time to read more thoroughly the record before us so that we might say with perfect assurance that the essential findings here indicated to be lacking are not concealed in some obscure portion of the report, we would proceed to issue an injunction against the enforcement of the order. However, the point last discussed by us was not argued at the hearing and we think that fairness requires that the parties be heard upon this question. Accordingly, IT IS ORDERED that the submission of the cause heretofore made on July 21, 1952, be vacated and the cause be and the same hereby is set for further argument before this court at the court room at Helena, Montana, at the hour of 10:00 o'clock A. M. on Monday, August 11, 1952.

And for the reasons herein stated, which are hereby adopted as the findings of the Court in connection with the order hereinafter stated and made, the Court finds that for good cause shown the aforesaid order of the Interstate Commerce Commission should be stayed and its operation and enforcement restrained in its entirety, pending the final hearing and determination of this action as herein ordered, and it appearing to the Court that it is necessary that the operation of said order be stayed and suspended and that a temporary injunction issue to that effect, in order to avoid irreparable damage which will result if the order is not granted, in that a multitude of claims for refunds would result should said stay not be granted and the

[24] Another point seriously urged by the plaintiffs during the argument was that the interstate rates were not declared by the Commission to be the only reasonable rates, that they were merely maximum rates found reasonable, while the rates ordered as the intrastate rates within Montana were determined by the Commission to be minimum reasonable rates which the Board would be without power to decrease. It was pointed out that the carriers could at any time publish rates below the interstate maximums. It is said that if and when the carriers do adjust interstate rates accordingly, there will be no appropriate or proper relationship between the interstate rates actually charged, and the minimum intrastate rates here fixed by the Commission.

As of now it occurs to us that this objection may be answered by the phraseology of the Commission's finding No. 7, but this we think may properly be the subject of further argument at the hearing hereafter fixed.

Court finally adjudge the order invalid. It is ordered that the operation of said Interstate Commerce Commission order be and the same is hereby stayed and suspended, and the defendants, their agents and all persons acting under them or pursuant to their authority be and they are restrained and enjoined from enforcing said order until the final hearing and determination of this action.

Dated this 24th day of July, 1952.

WALTER L. POPE, *Circuit Judge*,
CHARLES N. PRAY,
W. D. MURRAY, *District Judges*.

[Stamp:] Filed Aug. 13, 1952, H. H. Walker, Clerk, By ——— ———, Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION

STATE OF MONTANA, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA AND PAUL T. SMITH, LEONARD C. YOUNG AND AUSTIN B. MIDDLETON, as members of and constituting the Board of Railroad Commissioners of the State of Montana, Plaintiffs,

and

AMERICAN CRYSTAL SUGAR COMPANY, THE GREAT WESTERN SUGAR COMPANY AND HOLLY SUGAR CORPORATION, THE MONTANA STOCKGROWERS ASSOCIATION, a corporation, and THE MONTANA WOOLGROWERS ASSOCIATION, A voluntary association, Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant, No. 586

and

INTERSTATE COMMERCE COMMISSION, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Intervening Defendants.

Before POPE, Circuit Judge, and PRAY, Chief Judge, and MURRAY, District Judges.

Upon further hearing held pursuant to the Court's Order of July 24, 1952.

PER CURIAM.

In an opinion filed July 24, 1952, we stated the issues involved in this proceeding and our conclusions upon some of them. We called attention to the fact that the court was unable to discover that the Interstate Commerce Commis-

sion, here called the Commission, had made in connection with its order here under review, or in its proceeding designated as Ex Parte 168, which preceded the Commission's order relating to Montana intrastate rates, a finding which we felt was an essential prerequisite to the validity of such order. The apparent omission there referred to was the failure of the Commission to find the amount of revenue required from Montana intrastate traffic to enable the railroads operating in or through Montana to do so efficiently. Our reasons for considering such finding essential and our inability to discover such finding were fully set forth in the former opinion and what was there said need not be repeated here.

Upon the further hearing then ordered counsel for the respective parties have been given an opportunity to discuss at length the questions which had troubled the court. Extensive briefs carefully prepared and able arguments on both sides have been of material assistance to the court and we now proceed, starting where we left off in the former opinion, to discuss our views with respect to the matters which were reserved for further argument.

Counsel for the defendant, the Commission, and the intervening Railroads, have undertaken to make several answers to our inquiry as to where the missing finding could be found. Counsel for the Commission conceded that they are unable to point to any explicit statement in the report in Ex Parte 168 reciting in effect that the additional revenues necessary to permit the railroads to operate efficiently was such that there would be required not merely the 8 per cent increase in interstate rates there ordered but also a like increase in intrastate rates.[25]

The first contention made is that the intention of the Commission to make such a statement or to include a determination that its interstate increase was fixed at the amount of

[25] The Commission says: "While we also are unable to point to any explicit statement to that effect in the report in Ex Parte 168, we would point out that there is also no language therein which would indicate that the Commission's findings were based upon a contrary assumption; that is, there is no finding or other statement to the effect that the requirements of the railroads would be met by the interstate increase only. We think that the Commission merely failed to state the obvious."

8 per cent upon the assumption that a like increase would be obtained on intrastate rates may be gathered from certain press notices and from the Commission's annual report to Congress issued subsequent to the Ex Parte 168 order. On the day following the issuance of the interim increase order in Ex Parte 168, the Commission issued a notice to the public or press notice in which it said of the order and of the rate increase approved: "This estimate is based upon the assumption that corresponding increases will be made effective on intrastate traffic." A similar press notice was issued following a final order in that matter containing the statement: "These estimates assume corresponding increases in intrastate traffic." The final order in Ex Parte 168 was dated August 2, 1949. In its sixty-third annual report to Congress dated November 1 following, the Commission, with respect to the rate increases authorized in Ex Parte 168, said: "Based on the anticipated volume of traffic in 1949, our staff on December 29, 1948, estimated that the interim increases would yield a total of $425 millions additional revenue per annum to the class I railroads, provided corresponding increases were made effective simultaneously in intrastate traffic."

We think it is obvious that a finding wanting in the former report cannot be supplied from any such sources as those thus suggested. Aside fram the wholly impractical suggestion that interested parties might be required to wait from August 2, the date of the ord r, to November 1, the date of the annual report, to discover the essential finding, it is sufficient to say that under the provisions of Section 8b of the Administrative Procedure Act, (5 USC Sec. 1007b), all decisions of the Commission must "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion present on the record." We think it clear that the absent finding cannot be supplied by these press notices or the Commission's annual report.

Next it is argued that what we found missing both in the order here reviewed and in Ex Parte 168 is to be found in the Commission's findings in the earlier cases including

Ex Parte 162 and 166. It is said that both the initial and the final report in Ex Parte 168 discloses that that proceeding was but a later phase of the readjustment of charges of the railroads incident to postwar economic changes. It is said therefore that the order in Ex Parte 168 must be read as though it had incorporated by reference certain findings and statements of the Commission in earlier orders which were explicit upon the point in respect to which the Ex Parte 168 order was silent.

The initial report in Ex Parte 168, (272 ICC, at page 698) stated: "This proceeding is a phase of the readjustment of the charges of rail carriers inevitably incident to the late World War and its economic aftermath. Accordingly, this report is to be read with our latest report (titled 'on further consideration') in Ex Parte No. 166, *Increased Freight Rates, 1947,* 270 I. C. C. 403, and with preceding reports in that proceeding, and also with the reports in the earlier proceeding of a similar character, Ex Parte No. 162, *Increased Railway Rates, Fares and Charges,* 1946, the latest being found at 266 I. C. C. 537, and also reports in other proceedings involving the whole or major portions of the railroad rate level, referred to in the two reports cited. The present proceedings may be considered in effect, if not in form, a part of the series . . ."

In the final report in Ex Parte 166, the Commission undertook to determine the reasonableness of the proposed increased rates for a constructive normal year and to estimate the traffic expected to move thereunder. In considering the revenue effects of rate increases authorized, the Commission said that the table of such increases "assumes increases to have been approved on intrastate traffic similarly to those upon interstate traffic in the same territory, for the whole time." The Commission also said in its report in Ex Parte 166; "This estimate is upon the assumption that timely similar adjustments will be made upon intrastate traffic." [26]

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[26] The report also recited that its computations "presuppose that generally similar increases will be permitted by State authorities on intrastate traffic, or may become effective otherwise." It also said: "Considering

It is argued that an intention to include similar findings or statements in Ex Parte 168 is made manifest by the recital in the report in Ex Parte 168, that "We invited the cooperation of the State regulatory bodies as obviously state made rates would be involved." (272 I.C.C. at page 700.)

With respect to this argument that in effect the missing finding or statement was incorporated in Ex Parte 168 by the latter's reference to Ex Parte 166, we note that there is missing from the report in case No. 168 any general statement that everything said in Ex Parte 166 is now repeated in or intended to be a part of Ex Parte 168. Obviously the additional revenues called for by Ex Parte 168 are different in amount than those set forth in Ex Parte 166. The percentage of increase allowed is different. On the other hand, there were no doubt numerous reasons why the Commission in the opening sentence of its initial report in Ex Parte 168 should call attention to its earlier reports and should suggest that the later one be read with those which preceded it. There were numerous respects in which the later proceeding could be said to deal with problems mentioned in the earlier ones.

It seems to us that we would have to put a very strained construction upon these references in the initial report in Ex Parte 168 in order to arrive at a conclusion that they operated to bring about a statement in Ex Parte 168 of that which is clearly missing therefrom. Such a construction would be a strained one wholly apart from the inferences to be drawn from the fact that the Commission apparently deliberately made the finding or statement in one case and omitted to make the same finding in another case.

Our views as to the construction of the phraseology in the initial report in Ex Parte 168, which has here been urged upon us, cannot be better expressed than in the language of Mr. Justice Cardozo in *U. S.* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 510, as follows: "We would not be under-

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the entire record upon this feature of the proceeding we conclude that the orders heretofore entered, especially when action by the State authorities is finally completed upon the carriers' proposals, meet the emergency needs of the petitioning carriers, as shown by the record. . . ."

stood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency."

The third argument made on behalf of the intervening Railroad defendants throws even further doubt upon the sufficiency of the Commission's findings. That argument in substance is that the finding which our former opinion declared missing was wholly unnecessary. It was contended that since the Commission in Ex Parte 168 and in the proceeding here under review found that the Railroads have affected required additional revenues at the time the application in Ex Parte 168 was presented, and since it found that the Montana intrastate rates are now on a lower level than the interstate rates now found reasonable, the fact that both kinds of traffic moved under the same conditions, with costs inextricably commingled, requires a conclusion that the intrastate rates may be properly ordered brought in line with the interstate rates. Counsel who made this contention on behalf of the Railroads summarized his argument as follows: "I think it is clear from what I have said earlier that in view of the woefully inadequate revenues of the Montana lines, the low level of Montana intrastate rates, the fact that operating conditions are the same, that a contribution of no greater percent from Montana intrastate traffic than is currently being received from interstate traffic is not in excess of the amount needed by these lines to enable them to operate adequately and efficiently."

We find ourselves unable to go along with this argument.

It appears to us to be an attempt to contend that the mere existence of a disparity between intrastate and interstate rates is sufficient to warrant the Commission to prescribe intrastate rates. We think it sufficiently settled that "the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates." *Florida* v. *United States*, 282 U. S. 194, 211-212; *North Carolina* v. *United States*, 325 U. S. 507, 516. We think that counsel is attempting to sustain the order by what the Supreme Court called in the North Carolina case "a very simplified form of proof."

Here there is no finding as in *Florida* v. *United States*, 292 U. S. 1, 9, that the intrastate rate scale "was abnormally low and less than reasonably compensatory . . . 'insufficient under all the circumstances and conditions to cover the full cost of the service.'" There is nothing in the record before us to disclose a finding that the increased interstate rates and the existing intrastate rates are not both within a "zone of reasonableness."[27]

But the very fact that this argument thus rejected by us has been made here, suggests the possibility that the Commission accepted and acted upon a similar view. When that is considered there is brought to mind a special and peculiar reason why "a high standard of certainty" must be required of findings in a case of this character. For, as stated by Mr. Justice Cardozo in *U. S.* v. *Chicago, M. St. P. & P. R. Co.*, *supra*, at page 511, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." And as stated by Mr. Justice Douglas in *U. S.* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489, "An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain."[28]

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[27] The term is from U. S. v. Chicago, M., St. P. & P. R. Co., supra, at p. 506.

[28] The court there said (p. 489): "Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those

We remain of the opinion, previously expressed, that the essential finding mentioned is lacking in the Commission's report and order.

Finally, the defendants ask us to hold contrary to what was said in the former opinion that the order of the Commission must be sustained on the evidence and findings with respect to preference and prejudice as between persons and localities. In presenting this argument, defendants rely upon Georgia Public Service Comm. v. United States, 283 U. S. 765, 774, in which the Supreme Court said, with respect to a similar proceeding: "When an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings".[29]

It is contended that the Commission's findings of specific instances of preference and prejudice worked against interstate transportation and in favor of comparable intrastate hauls are sufficiently numerous and sufficiently typical to warrant the general, state-wide rate order here involved.

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standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basis and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.'"

[29] The text quoted by defendants is as follows: "The appellants contend that the findings are unsupported by the evidence. When an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings. *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 579. Compare *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 83. While the order relates only to a few commodities, the scales of rates are statewide in operation; and they apply to shipments between hundreds of points of origin and destination. To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief. Compare *New England Divisions Case*, 261 U. S. 184; *Railroad Commission* v. *Chicago, B. & Q. R. Co., loc. cit. supra.* The evidence was comprehensive in scope. It occupies 556 pages of the printed record; and there were besides 337 exhibits. The proof of the discrimination against interstate commerce was specific and typical, and was clearly sufficient to establish the undue prejudice to interstate shippers. Compare *Nashville, C. & St. L. Ry. Co.* v. *Tennessee*, 262 U. S. 318; *United States* v. *Illinois Cent. R. Co.*, 263 U. S. 515."

So far as the Georgia Comm. case, supra, is concerned we think that it does not constitute authority for such a position here. The order in the Georgia Comm. case had to do with rates on but four related products, namely, chert, clay, sand and gravel. The indication by the Supreme Court that typical instances of preference and prejudice, with respect to these few products, would justify a general order with respect to such products does not suggest to us that we would be warranted in holding that the few instances of preference and prejudice listed in the present report and order, relating in the main to petroleum products, sugar beets, livestock, cement, coal and ore and concentrates could be so typical of the shipments of manifold unrelated products as to constitute a basis for the order here in question. We can understand how the instances of preference and prejudice, in respect to shipments of petroleum products which are listed in the report, might well be so typical of all intrastate shipments of petroleum products that a general order increasing the rates on petroleum products might be sustained. That was the Georgia Comm. case. But we cannot perceive how findings of instances of preference and prejudice in the case of shipments of coal, petroleum products, cement and other items listed in the report could justify a general order relating to shipments of books, paper, household goods, harnesses, farm machinery, paints, lumber and a mass of other items not mentioned in the Commission's report.[30]

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[30] In the argument considerable emphasis was placed upon the disparity between interstate and intrastate rates on sugar beets. Some Montana beet factories shipped a portion of their beets from other states, while others receive only intrastate shipments. In the case of each sugar mill, the farmer producers receive identical prices, whether the producer be within or without the State. It would appear that the main preference and prejudice, if any, operates against the sugar mill rather than the producer. But the owners of the sugar mills have all intervened here in support of the State. It is urged that the portion of Section 13 (4), which authorizes the Commission to eliminate preference and prejudice as between persons and localities, is one enacted for the benefit of shippers and not the carriers, and that so far as the sugar beet industry is concerned the carriers are not in a position here to claim any advantage from the existence of any disparity in rates as to sugar beets. We find it unnecessary to express an opinion upon this point.

To support their argument that the instances of preference and prejudice here involved were not only typical but numerous and of major importance, counsel have asked us to examine Exhibit 3, which was introduced in evidence before the Commission. This Exhibit, it is said, enumerates item by item numerous products in respect to which definite losses are asserted to have resulted from the failure to obtain the intrastate increases demanded. We have been supplied with what purports to be a copy of that exhibit, showing the amounts of claimed losses set opposite each of these items, the total aggregating $535,550.55, which would be a major portion of the $700,000.00 which the Commission found might have been procured by the Montana intrastate increases. It is sufficient to say that to arrive at any such figures we would be obliged to delve into the record and go behind the Commission's findings. Under these circumstances "We are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body * * *." Florida v. United States, 282 U. S. 194, 215.

We find also that many of the Commission's findings, with respect to preference and prejudice as between persons and localities, lack sufficient definiteness and specificity to be significant. Thus the Commission refers to a certain shipment of 970 pounds of mattresses and box springs from Spokane to Missoula on which the first-class rate of $2.03 was charged. It proceeds: "If a similar shipment *were made* from Billings to Helena, the rate would have been $1.54 * * *." (Emphasis added.) Note that the similar shipment is purely hypothetical and the statement is in the subjunctive mode. Unless such shipments are found to have been made, there cannot be discriminatory prejudice. We think that a mere finding as to discrepancies in published rates without finding that shipments have been made in accordance with the differing rates are without significance. Numerous insufficient references of this kind are in the Commission's report. Thus the Commission compares rates on carloads of coal from Bearcreek, Montana, to Heron, Montana, a distance of 545 miles, with similar rates to

Clark's Fork, Idaho, 559 Miles. We are not advised as to how many carloads of coal were shipped under these rates to these points or whether any carload of coal was ever shipped from Bearcreek to either Heron or Clark's Fork. Findings are made as to disparity in rates on molasses shipped from a sugar mill at Chinook, Montana, to Billings on the one hand, and to Idaho Falls, Idaho, on the other. The Court probably may take judicial notice of the fact that the Chinook factory is now located in the State of Washington.

But in any event, wholly apart from the matters mentioned, we adhere to our former holding that the findings as to preference and prejudice as between persons and localities will not sustain the general order now before us.

It will be noted that notwithstanding what the Supreme Court said in the Georgia Comm. case, supra, in North Carolina v. United States, supra, at page 513, the Supreme Court reaffirmed what it had said in Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, to the effect that a general sweeping order against all intrastate rates may not be predicated upon findings of discrimination against particular localities and business groups made by the Commission under the clause about "persons" and "localities", which is a restatement of the Doctrine of the Shreveport case, 234 U. S. 342. As stated in Railroad Commission v. Chicago B. & Q. R. Co., supra: "In such a case, the saving clause by which exceptions are permitted, cannot give the order validity."

For the reasons stated, both here and in our former opinion, we find that the order, the findings and the report of the Commission, now before us, lack the essential determination and finding of fact to which we have previously referred, and that such lack is not supplemented by any of the matters herein referred to. In short, we find that the Commission has made no finding as to what amount of revenue, if any, was required from intrastate traffic in Montana to enable the railroads here affected to operate efficiently. Accordingly, for the reasons and on the grounds stated, both in this and in our former opinion, both of which are hereby adopted as the findings of this Court, we hold and

conclude that the order here reviewed is not supported by the necessary findings of the Commission and that the same is void and in excess of the powers of the Commission. A permanent injunction will issue accordingly.

Dated this 13th day of August, 1952.

WALTER L. POPE,
Circuit Judge.

CHARLES N. PRAY,
W. D. MURRAY,
District Judges.

(5037)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 455

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, ET AL., *Appellants,*

vs.

STATE OF MONTANA, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, ET AL.

MOTION TO AFFIRM

ARNOLD H. OLSEN,
Attorney General of the State of Montana;

H. M. BRICKETT,
Assistant Attorney General of the State of Montana;

EDWIN S. BOOTH,
Secretary-Counsel of the Board of Railroad Commissioners of the State of Montana and Special Assistant Attorney General of the State of Montana,

Counsel for Appellees.

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IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA, HELENA DIVISION

Civil Action No. 586

STATE OF MONTANA, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA AND PAUL T. SMITH, LEONARD C. YOUNG AND AUSTIN B. MIDDLETON, AS MEMBERS OF AND CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA,

and *Plaintiffs-Appellees,*

AMERICAN CRYSTAL SUGAR COMPANY, THE GREAT WESTERN SUGAR COMPANY AND HOLLY SUGAR CORPORATION, THE MONTANA STOCKGROWERS ASSOCIATION, A CORPORATION, AND THE MONTANA WOOLGROWERS ASSOCIATION, A VOLUNTARY ASSOCIATION,

Intervening Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,

and *Defendant*

INTERSTATE COMMERCE COMMISSION,

and *Intervening Defendant,*

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY AND CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Intervening Defendants and Appellants

MOTION TO AFFIRM

Appellees, State of Montana, Board of Railroad Commissioners of the State of Montana and Paul T. Smith,

Leonard C. Young and Austin B. Middleton, as members of and constituting the Board of Railroad Commissioners of the State of Montana, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States, move that the judgment and permanent injunction of the District Court be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Statement

This is a direct appeal from the final judgment and injunction entered herein August 13, 1952,[1] by a district court of three judges, specially constituted pursuant to Title 28 U. S. Code, Sections 2284 and 2321 to 2325 inclusive. The judgment and injunction sets aside and permanently enjoins the enforcement of an order of the Interstate Commerce Commission. The appeal of the intervening defendants, Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Burlington & Quincy Railroad Company, Union Pacific Railroad Company, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company was allowed on October 9, 1952, and the appeal papers were served October 13, 1952. The petition for appeal of the defendant United States of America and intervening defendant Interstate Commerce Commission was denied by the District Court on October 16, 1952.[2]

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[1] The Court's *per curiam* opinion filed July 24, 1952 is reported in 106 Fed. Supp. 778 (Advance Sheets) and the *per curiam* opinion of August 13, 1952 is reported in 106 Fed. Supp. 786 (Advance Sheets). Both of these opinions are attached as an exhibit to the Appellant's Statement as to Jurisdiction.

[2] The affidavit of the Assistant United States Attorney filed with the Court discloses that the appeal papers were not received so that timely filing could be made.

The Order of the Judge denying the appeal, dated October 16, 1952, states,

"It is ordered that the said appeal be not allowed and the petition be

The Order so set aside is dated May 20, 1952 and as subsequently modified, required the respondents (all the rail carriers operating in Montana) to cease and desist on August 1, 1952, upon 5 days notice to the defendant commission and the general public from practicing (1) the unjust discrimination against interstate Commerce and (2) the undue preference of and advantage to certain persons and localities in intrastate commerce, and undue prejudice and disadvantage to certain persons and localities in interstate commerce, found to exist in the defendant commission's report of February 4, 1952.[3] The Commission Report and Orders found that intrastate rates in Montana resulted in the purported discrimination, preference and prejudice to the extent that such rate did not bear the same increases as granted by the Commission on interstate rates. The order requires that rates and charges for intrastate traffic be increased to the same extent as increases applicable interstate.

The Commission proceedings involved in the case was Docket 30674, *Montana Intrastate Freight Rates and Charges.* The Commission Report in this case was issued February 4, 1952. The Commission did not issue a simultaneous order carrying the findings and conclusions of the report into effect, but withheld its order for thirty days to permit the Board of Railroad Commissioners to allow the increases to go into effect. The Board of Railroad Com-

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and the same is denied on the ground and for the reason that the Court and this Judge is without authority and lacks jurisdiction to allow said appeal, it having been presented to him out of time of the period fixed by statute.

"The Court has previously signed an order allowing the appeal of the carrier intervenors in the above entitled action and would have allowed the appeal in this instance if the petition and application had been made timely."

[3] The Commission's Report is reported in 284 I.C.C. 167. Copy of the report is attached to Appellant's statement as to jurisdiction.

missioners and others petitioned for reconsideration and these petitions were denied by order of the Commission dated April 7, 1952 and the Board was granted until May 15, 1952 to permit the increases to be made applicable. Subsequently by Order dated May 20, 1952, the intrastate increases were ordered, effective July 1, 1952. This proceeding was then commenced and at the request of the Court, the effective date was extended to August 1, 1952. The Court, after hearing, in its opinion and order of July 24, 1952, issued a temporary restraining order and set the case for further argument. On August 13, 1952 the Court issued its second and final "per curiam" opinion and its final and permanent injunction.

The intervening defendants and appellants are common carrier railroads operating in Montana in both interstate and intrastate commerce. The appeal of the defendants, United States of America and the Interstate Commerce Commission, was denied because of failure to file in time. All parties defendant defended the action in the lower court and it is assumed that all defendants will appear on the appeal, in some manner, notwithstanding the denial of their individual appeal. This motion to affirm would likewise be made to any representations by other defendants and is considered equally applicable to any such representations.

The statement of the facts is contained in the Report of the Commission, *supra*, and the opinions of the Court, *supra*. Reference to facts will be made where necessary in the brief and an additional statement is not considered necessary. Briefly, the question presented is the right of the Commission, on the record before it, to order increase of Montana intrastate freight rates and charges under either condition mentioned in Section 13(4) of the Interstate Commerce Act.

Statutes Involved

Pertinent portions of the Interstate Commerce Act involved in this proceeding are as follows:

"*Section 13.* (As amended June 18, 1910, February 28, 1920, August 9, 1935, and September 18, 1940) (U. S. Code, title 49, sec. 13).

"(1) • • •

"(2) • • •

"(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier, concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

"(4) *Whenever in any such investigation the Commission, after full hearing,* finds that any such rate,

fare, charge, classification, regulation, or practice *causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce*, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. (Emphasis supplied.)

"*Section 15a.* (Added February 28, 1920; amended, June 16, 1933, and September 18, 1940.) (U. S. Code, title 49, sec. 15a.)

"(1) * * *

"(2) *In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration*, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. (Emphasis supplied.)"

Evidence, Reports and Orders in General Increase Cases Are Not Adequate to Support an Order under Section 13 (4) Increasing State Rates

Stress has been placed on the evidence before the Commission and the Commission's Reports in General Increase

Cases, Ex Parte Nos. 162, 166 and 168. (*Increases in Railway Rates, Fares and Charges, 1946 (Ex Parte 162)*, 264 I. C. C. 695, 266 I. C. C. 537; *Increased Freight Rates, 1947 (Ex Parte 166)*, 269 I. C. C. 33, 270 I. C. C. 81, 93 and 403; *Increased Freight Rates 1948 (Ex Parte 168)*, 272 I. C. C. 695, 276 I. C. C. 9). The Commission's findings (Findings 4, 7) are to the effect that intrastate rates must be increased to the same extent allowed in those dockets on interstate traffic. The Commission on page 203 of its Report, *supra*, said:

> "Our power to require an increase in intrastate rates and charges depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate. Respondents are here seeking to secure from Montana intrastate freight traffic, a contribution to maintenance and operating costs, including taxes, more nearly proportionate to the contribution thereto made prior to the increases in Ex Parte Nos. 162, 166, and 168. We may properly use such prior contribution as a valid criterion of fairness, in the light of which the Montana intrastate rates and charges in 1947 to 1950, inclusive, afforded a disproportionately small share of the revenue required to meet the costs of the service in Montana. See *Increases in Florida Intrastate Rates*, 278 I. C. C. 41, 67."

The above quoted paragraph summarizes the position of the defendants. They apparently contend that the Commission, having increased interstate rates, may now order increase of intrastate rates without specific and substantial evidence relating to state operations. Such a contention is contrary to the law.

The general increase cases were entered into and the Reports and Orders made pursuant to the authority of

Section 15a of the Act and the National Transportation Policy (Note preceding 49 U. S. C. 1). We do not here question the authority of the Commission as to interstate rates. However, that authority is not applicable to actions under Section 13(4) relating to intrastate rates. This Court in *North Carolina* v. *The United States*, 325 U. S. 507, 510, 511, set forth the standards to be applied in cases involving state rates when it said:

> "Section 13(4) does not relate to the Commission's power to regulate interstate transportation as such. As to interstate regulation, the Commission is granted the broadest powers to prescribe rates and other transportation details. * * * *No such breadth of authority is granted to the Commission over purely intrastate rates. Neither Section 13(4) nor any other congressional legislation, indicates a purpose to attempt wholly to deprive the states of their primary authority to regulate intra-state rates.* Since the enactment of Section 13(4), as before its enactment, *a state's power over intra-state rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section.* When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate.
>
> "Intra-state transportation is primarily the concern of the state. *The power of the Interstate Commerce Commission with reference to such intrastate rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation.* * * * A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet 'a high standard of certainty'. * * * *Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear.'* * * * And the intention to interfere with the state's rate-making func-

tion is not to be presumed, * * * nor must its intention in this respect be left in serious doubt. * * * *The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission.*" (Emphasis supplied.)

The Court in its footnote 4 to the *North Carolina* case (325 U. S. 515) distinguished between cases arising before and since the 1933 amendment to Section 15(a) of the Act.[4] These distinctions would apply to consideration of any decision on facts existing before amendment, including the decision in *United States* v. *Louisiana*, 290 U. S. 70. Prior to amendment of Section 15a in 1933, the railroads of the nation were considered as a unit. Since amendment the pooling arrangement of revenues has been discontinued and railroads are considered individually. The cases prior to the 1933 amendment should be read in the light of the amendment and this Court's opinion in the *North Carolina* case.

The lower court had the entire record of the proceedings before the Commission before it as an exhibit in this case. The court stated that it examined the record and examination of its opinions disclose reliance on matters stated in the record. The court's interpretation of the controlling opinions was sound and correct. The finding by the Court that the record in this case, including the report and findings, does not disclose either findings or facts which support the Commission's action is in accordance with the statute and the decisions.

There can be no question but that the Commission feels the intrastate increases should be allowed. This was recog-

[4] The text of Section 15a before amendment is set forth in the notes to *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 256 U. S. 563, 582.

nized by the District Court. Belief of the Commission, based on the records in the general increase cases or otherwise, is not however sufficient to warrant action. The facts must appear in the record. Nor is it material that a cooperative panel of state commissioners participated in the case. The hearings held by the Commission on the general increase cases were not such hearings as are contemplated by Section 13 (3) or 13 (4). The Commission reports, supra, show that state evidence was not considered but only cumulative system figures. The comments of the Commission quoted shows that it considered overall figures, in making estimates and that it contemplated appropriate action would be taken before the various state agencies as to intrastate rates. It does not, and could not, determine what the result of that action would be. The Commission could not contemplate anything other than that the state commissions would take appropriate action on applications filed before them. This record shows that Montana did consider and act on all the applications filed.[5]

The cooperative panels of state commissioners, sitting with the Commission, had no authority to bind either their own states or any other states. They had no vote on the proceedings. We call attention to the statements made relative to the cooperating panels. In *Ex Parte 162*, 266

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[5] The Montana Board granted all corresponding increases in *Ex Parte 162*, except the minimum rate was raised to 35 cents instead of 50 cents per 100 pounds and the minimum charge was raised to 75 cents instead of $1.00 per shipment (Ex. 4).

The Board granted all corresponding increases in *Ex Parte 166* except 10 percent instead of 20 percent on sugar beets and livestock (Ex. 5, 6, 7, 8).

The Board denied the 8% inerease in Ex Parte 168 (Ex. 9, 10).

While *Ex Parte 175* increases are not here involved we call attention to the fact that the Montana Board has authorized all increases provided by Commisison Order of August 2, 1951 (281 I.C.C. 557) and application for the increases corresponding to the Commission Order of April 11, 1952 is now pending before the Board.

I. C. C. 537, 613, it appears that the cooperating committee of four state commissioners participated in the discussion and proposed that the increases be less than those approved and after further examination a majority of the committee agreed in general with the results reached in the report and finding of the Commission. In *Ex Parte 166*, 270 I. C. C. 403, 463, it appears that three of the four cooperating state commissioners (The other member was absent) authorized the Commission to state that they concur in the foregoing report. In *Ex Parte 168*, 276 I. C. C. 9, 113, it appears that a cooperating committee conferred with the Commission after oral argument, but did not participate in the preparation or consideration of the report. Nothing in these statements or in the facts indicate that any weight should be given to their participation insofar as a subsequent case under Section 13 (4) is concerned. The questions involved in such proceedings were different and no evidence relating to any individual state's rates were involved. The participation of the committee of state commissioners is to be distinguished from a joint hearing before a state board and the commission, involving interstate and intrastate rates of a particular state.

The view of the Commission and Appellants that the intrastate rates may be increased on the basis of hearings and findings of the Commission in a general increase case (regardless of the evidence, or lack of evidence in a hearing under Section 13 (4)) is contrary to the expressed and implied terms of Section 13 (4)) and the interpretation of this court in the *North Carolina* case, the only general increase case decided by it since the 1933 amendment to Section 15a. If this view were correct, then it would appear that state commissions would be completely without authority except to make an administrative approval. Were the Commission to isue an order after a

hearing on an application for interstate increases under Section 15a that state rates were to be increased within 30 days, we believe everybody would agree the order was in excess of jurisdiction. The mere hearing of a supplemental application for the same relief (after a state had denied increases) based on system figures and consideration of the record in the general increase case is actually nothing more than that. Unless the findings of the Commission are based on substantial evidence in that proceeding and the findings show existence of either one or both of the conditions stated in Section 13 (4), the Commission cannot order increase of state rates. *Florida* v. *United States,* 292 U. S. 1, *North Carolina* v. *United States, supra.*

The contention that unless the authority of the Commission to act promptly exists, the Congressional requirements will "be nullified and the administrative arm of the Commission paralyzed", appears to be one of expediency. We are unable to see where a requirement that the Commission act according to the Congressional directive of Section 13 (4) will in any manner paralyze the Commission. The Commission should not void Congressional action for any reason. *North Carolina* v. *United States, supra, Thompson* v. *United States* (decided June 2, 1952) 72 Sup. Ct. 978. It is the duty of the Congress to enact laws and if the law should be changed, then appropriate action should be taken by that arm of the government.

The Findings of the Court That the Record Does Not Disclose Preference or Prejudice of Interstate or Intrastate Shippers to Justify the Commission Order Is in Accordance With the Law.

Section 13 (4) of the Act, *supra,* contains two specific conditions when the Commission can order increase of intrastate rates. The section requires that a "full hearing"

be held and that either or both of these conditions must be found to exist. The first of these conditions is that the state-made rate "causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other."

The Commission findings 3, 6 and 7 find in effect that there is active competition between persons and localities in interstate and intrastate commerce, extending throughout the state and to all class and commodity traffic, that the maintenance of the state-made rate results in preference and prejudice between persons and localities which should be eliminated by increasing the intrastate rates. The evidence and the Commission report shows that, with the limited exception of cement in a small area, and petroleum products, there were no shipper witnesses complaining of any undue preference or prejudice. There were no localities alleging or testifying to preference or prejudice. On cement, the evidence discussed in the Commission Report (284 I. C. C. 191) is that as to certain points on the Northern Pacific in Western Montana, the rates from a cement mill at Irwin, Washington are higher than from Trident, Montana because of the failure of the Montana Commission to grant the Ex Parte 168 increases. The Spokane Portland Cement Company claims they are prejudiced by the Montana intrastate rates, but there is no evidence to support such claim. As to petroleum products, the Husky Refinery Company at Cody, Wyoming claims it is prejudiced by the Montana intrastate rates. (See Commission Report, *supra*, 193). There is no evidence as to any loss of business by the Cody shipper and better than half of the transportation is by motor truck. The record further discloses that the carriers have removed the Ex Parte 168 increases in many instances (Ex. 52 of the Commission Proceedings).

The District Court was correct in its finding that mere rate disparities did not establish evidence of prejudice and preference. The Court discussion of this question, in its opinion of August 13, 1952, *supra,* is in accord with the principles in *Railroad Commission* v. *C. B. & Q. R. R. Co.,* 257 U. S. 563 and *North Carolina* v. *United States, supra, Florida* v. *United States,* 282 U. S. 194 and *Florida* v. *United States,* 292 U. S. 1.

Appellants contend that the Commission made subsidiary findings as to commodities involving $535,000 of revenue. As we previously pointed out, these subsidiary findings rest exclusively on rate disparities, except to the limited extent on cement and petroleum products just mentioned. The total revenue increase from cement and petroleum products rates involved in this case which might be expected because of removal of the alleged prejudice and preference would be insignificant.

In *Florida* v. *United States,* 282 U. S. 194, the Court said,

> "In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the relation of rates to each other. In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carriers' revenue, the question is that of the relation of rates to income."

In a very comprehensive review of authority under Section 13 of the Interstate Commerce Act, this Court in *North Carolina* v. *United States,* supra, speaking of prejudice against interstate traffic, said:

> "In effect, the Commission's holding was, and its argument is here, that Section 13 (4) automatically requires complete uniformity in intra-state and inter-

state rates. That argument is in short that under our national transportation system interstate travelers and intra-state travelers use the same trains; for a state to fix a lower intra-state rate than the interstate rate is therefore an undue advantage to the intrastate passengers and an unfair discrimination against the interstate passengers. *If Congress intended to permit such an oversimplified form of proof to establish 'unjust discrimination,' then its requirement of a 'full hearing' was mere surplusage.* In fact, it need have provided for no hearing at all since it could have easily stated in its legislation that intra-state rates shall never be lower than interstate rates. *The argument of the Commission in this regard runs counter to the language of Section 13 (4), and would call for a declaration by us that Congress intended by this section to reverse the entire transportation history of the nation.*

"• • •

"In Wisconsin Railroad Commission v. C. B. & Q.R.R. Co., 257 U. S. 563, 579, 580, 42 S. Ct. 232, 234, 235, 66 L. Ed. 371, 22 A.L.R. 1086, this Court refused to sustain a Commission order nullifying all state passenger rates because of a discrimination against interstate travelers and against localities. The Commission had found there as here that state and interstate passengers rode on the same trains in the same car and perhaps in the same seats. It had found there, as it did here, that this constituted an undue discrimination against interstate passengers, and it issued a general sweeping order against all intra-state passenger rates. This Court pointed out that the order went far beyond the principles announced in the Shreveport case, and declined to sustain the statewide order on this phase of the case. See also Florida v. United States, 282 U. S. 194, 208, 51 S. Ct. 119, 122, 75 L. Ed. 291. *So here, the finding that interstate passengers paid higher fares than intra-state passengers for the same facilities is an inadequate support for nullifying state rates on the ground that they constitute unjust*

discrimination against interstate passengers." (Emphasis supplied)

See also:

Wisconsin Railroad Commission v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086;
Florida v. *United States*, 282 U. S. 194, 51 S. Ct. 119, 75 L. Ed. 291;
Florida v. *United States*, 292 U. S. 1.

The rule that in order to justify a finding of prejudice and preference under the Interstate Commerce Act the evidence is required to show detriment to persons or localities in interstate commerce has been repeatedly followed by the Commission. In *Dewey Portland Cement Co.* v. *Atchison T. & S. F. Ry. Co.*, 174 I. C. C. 87, 105, the Commission said,

> "It is well settled, however, that a mere difference in rates is not enough to establish a case of undue prejudice to interstate shippers or unjust discrimination as against interstate commerce. There must be more; for instance, a further showing that the difference in rates, actual or relative, *is the moving factor in creating undue prejudice to competing shippers in interstate commerce or in casting an undue burden upon or obstructing such commerce.*" (Emphasis supplied)

And in *Intrastate Rates in New Jersey*, 203 I. C. C. 357, 360, the Commission said,

> "To show that the rates prescribed by the New Jersey board would be prejudicial to shippers and localities in interstate commerce respondents rely almost entirely on rate comparisons showing that the intrastate rates would be lower than certain comparable

interstate rates prescribed in the Eastern case. For example, it is shown that from Martins Creek, N. J., to Jersey City, 80 miles, the prescribed intrastate first-class rate would be 52 cents, while the interstate rate from Portland, Pa., to the same destination for 78 miles is 54 cents. Many more examples of the same kind are set forth in respondents' exhibits. *Findings of undue prejudice and preference may not be predicated merely upon a showing of such disparities. The mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates,* Florida v. United States, 282 U. S. 194, 212. Shippers who presumably might be adversely affected by the differences stressed by respondents have manifested no concern over them, so far as the record shows, * * *." (Emphasis supplied)

See also:

Mutual Creamery Co. v. *American Railway Express Co.*, 132 I. C. C. 207, 211;

Associated Bristol Retail Coal Dealers v. *Southern Railway Co.*, 283 I. C. C. 387;

Dewey Portland Cement Co. v. *Alton E. R. Co.*, 176 I. C. C. 671, 685;

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Rates on Raw Dolomite and Fluxing Stone in Ohio, 188 I. C. C. 495, 511;

Georgia Veneer & Package Co. v. *A. C. L. R. Co.*, 206 I. C. C. 566, 574;

Emergency Freight Charges in Minnesota, 210 I. C. C. 289, 292;

Increase in Montana Freight Rates and Charges, 255 I. C. C. 131.

Under Court and Commission opinions mere disparity in rates is insufficient to warrant findings of preference and

prejudice, which would justify action under Section 13 (4) of the Act. The Commission Report shows nothing further, except as to limited testimony on cement and that testimony would be insufficient to support the statewide rate order made by the Commission. The carrier cannot take advantage of disparity of rates to show prejudice or preference. *To permit the carrier to take advantage of this provision would mean that absolute uniformity of rates is required. This is contrary to law.* The Court's finding that this record does not contain evidence sufficient to support a finding of preference and prejudice under Section 13 (4) and an order raising intrastate rates, is in full accord with the statutes, the decisions of this Court and of the Commission. There is no substantial question involving this feature of Section 13 (4).

The Findings of the Court That the Record Does Not Disclose Facts or Findings Sufficient to Prove Revenue Discrimination Is in Accordance With the Law.

The second condition referred to in Section 13 (4) when the Commission may raise intrastate rates is when such state-made rate causes "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." This clause relates to the revenue needs of the carrier. The question under this provision is the relationship of rate to income. *Florida* v. *United States*, 282 U. S. 194, *North Carolina* v. *United States*, supra.

The record shows that system figures only were submitted by appellant carriers. The carriers testified that interstate and intrastate traffic was handled in the same trains and by the same facilities. There is no other evidence as to Montana operations, either interstate, intrastate or total state. Appellants' testimony shows numerous rate comparisons. The disparities shown by reason of the Montana Board's action is relied on to show revenue

discrimination. The evidence specifically shows that the present rates are not below minimum reasonable rates and appellant's witnesses state that the requested rates will not be above maximum reasonable rates. In other words, they fall in the zone of reasonableness between maximum and minimum reasonable rates.

Based on this evidence the Commission made its findings (284 I. C. C. 204). The Commission found that transportation conditions incident to intrastate freight in Montana are not more favorable than between Montana and interstate points (Finding 1). It further found that the present interstate rates are just and reasonable and intrastate rates approved will not exceed a just and reasonable level (Finding 2). It further found the rates as therein approved will increase revenues by not less than $600,000 and will constitute not more than a fair proportion of respondent's total income; that rates lower than those therein approved causes unjust discrimination against interstate commerce; and that the discrimination should be eliminated by increasing the rates to the same extent as are and for the future may be maintained on like interstate traffic to and from points in Montana under authority of Ex Parte Nos. 162, 166 and 168 (Findings 5, 6, 7). The Commission then inserted a savings clause providing that the findings are without prejudice to the right of the authorities of Montana or any other party to apply for modification as to any specific rates and charges on the ground that they are not related to interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

The Interstate Rates Are Not Specified Reasonable Rates

The Commission found in its finding 2 that the interstate rates were just and reasonable. *There is nothing in this*

record whereby any rate may be determined to be reasonable. Sole reliance is placed on the findings in the general increase cases. This same finding that interstate fares were just and reasonable was made by the Commission in *Alabama Intrastate Fares*, 258 I.C.C. 133. However, on appeal, in the North Carolina case, supra, this Court said there was doubt as to whether the interstate fare had ever been fixed as the only reasonable rate. This same condition exists with reference to the interstate rates approved in the Ex Parte cases. In each of the orders in Ex Parte 162, 166 and 168, supra, a finding was made that the "rates and charges increased as herein permitted are not considered as prescribed rates, within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 248 U. S. 370." In 269 I.C.C. 33 (Ex Parte 166) the Commission commented on the right to award reparations if unjust or unreasonable rates result in damages. And in the final orders in *Ex Parte 166*, 270 I.C.C. 403, 454, and *Ex Parte 168*, 276 I.C.C. 9, 111, the Commission recognized the fact that some of the increases might disturb rate relations, and stated that the carriers had given assurance that adjustments would be made and that they expected full and prompt compliance with these representations.

The Commission itself refused to declare that the interstate rates are specific reasonable rates in the basic general increase cases. It reserved the right to award reparations on any of the rates in the event of complaint. It specifically said that the carriers should make downward revisions in rates for the purpose of re-establishing rate relations or to retain traffic. Under these conditions and based on the Ex Parte Orders, it cannot now find as it did in Finding 2 of this case that the interstate rates are the reasonable and just rates. The most it could say is that, until proven to the contrary, the interstate rates are not above a reasonable

maximum level. Nor does the Report, supra, disclose any other basis than the Ex Parte Orders on which the rates may be determined to be reasonable.

The best explanation of the Commission's intent as to declaring any of the interstate rates as reasonable rates is to be found in the Commission's own words. In *Coal from Illinois to Alton and East St. Louis*, 274 I.C.C. 637, considering the situation as to rates approved in Ex Parte 115 and 162 being reasonable rates, the Commission said,

> "In approving both of the general rate increases relied upon we said that the rates increased as permitted are not considered as prescribed rates, within the meaning of Arizona Grocery Co. v. Atchison T. & S. F. Ry. Co., 284 U. S. 370. The effect of that statement is equivalent to saying that while general increases were found reasonable, such general approval does not have the effect of approving any particular increased rate as not being in excess of a maximum reasonable rate."

The District Court in its opinion of August 13, 1952 in rejecting the theory that state rates should be increased because of the action in the general increase cases, said,

> "We find ourselves unable to go along with this argument. It appears to us to be an attempt to contend that the mere existence of a disparity between intrastate and interstate rates is sufficient to warrant the Commission to prescribe intrastate rates. We think it sufficiently settled that 'the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates.' Florida v. United States, 282 U. S. 194, 211-212; North Carolina v. United States, 325 U. S. 507, 516. We think that counsel is attempting to sustain the order by what the Supreme Court called in the North Carolina case 'a very simplified form of proof.'
>
> "Here there is no finding as in Florida v. United States, 292 U. S. 1, 9, that the intrastate rate scale 'was

> abnormally low and less than reasonably compensatory . . . 'insufficient under all the circumstances and conditions to cover the full cost of the service'. There is nothing in the record before us to disclose a finding that the increased interstate rates and the existing intrastate rates are not both within a 'zone of reasonableness.' "

The "zone of reasonableness" referred to was that discussed by this Court in *United States* v. *Chicago M. St. P. & P. R. R. Co.*, 294 U. S. 459, 506, when it said,

> "There is no suggestion in the report that the rates have been so reduced as to be less than compensatory. True they do not reach the maxima beyond which charges are excessive. On the other hand, they do not pass the minima beyond which charges are too low. *A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust the charges itself.*" (Emphasis supplied.)

This case does not involve the reasonableness of the Commission's action in approving the interstate rates under Section 15a. It may even be conceded that the interstate rates are not above reasonable maximum levels. The Commission report does not disclose any cost study or other evidence from which it may be determined that any state rate is less than compensatory or below a minimum reasonable level. *The interstate and intrastate rates may both be within the recognized "zone of reasonableness."*

The Commission action would make the maximum rates it approved, the minimum reasonable rates for the state. Notwithstanding the fact that the carriers may and are expected to adjust the rates to meet conditions, the state commissions would be denied the right to properly consider rates within their own boundaries. *The maximum interstate rate thus at the same time becomes the minimum intrastate rate.* While there will remain a zone of reasonableness for the

carriers, such a zone would be eliminated for the states and only one rate will be permitted, i. e., the maximum reasonable rate fixed by the Federal Commission.

There Is No Evidence or Finding as to the Amount of Revenue Required from Intrastate Service

The District Court held that there was no evidence or finding as to the amount of revenue required from intrastate service. The Court was correct. Examination of the record and the report of the Commission discloses nothing other than system figures, estimates of intrastate revenues and disparity of rates. Finding 5 of the Commission that the increase of intrastate rates ordered will increase revenues by more than $600,000 and will "constitute not more than a fair proportion of respondents' total income," is nothing more or less than a computation based on traffic estimates. Presumably the statement would have been the same whatever amount the computation might have produced. Examination of the evidence and the report shows that the Commission is relying solely on disparity of rates and the erroneous principle that rates must be maintained in exact relationship. Such a principle is contrary to its own statement that the interstate rates are maximum only and may be reduced by it on complaint or voluntarily by the carriers. Such a principle would presuppose uniformity of rates contrary to Section 13 and the numerous authorities cited.

Reference is made to the case of *Illinois Commerce Commission* v. *United States*, 292 U. S. 475 where it was held that the state rates should be raised to the same extent as interstate rates. Appellants contend that case is applicable here. In that case rates within a small switching district were involved and the initial hearing was a joint hearing as to both interstate and intrastate rates. That case is not applicable in a statewide situation, as has been recognized

by this court in the Note appearing on page 515 of the North Carolina case, supra.

There is no evidence or finding as to how much, if any, revenue is needed from intrastate traffic in order to provide a fair share of the carriers' total income. There is no evidence or finding as to what amount of revenue was required to enable the railroads to operate efficiently. The only finding is in Finding 4 that intrastate rates are not contributing their fair share of revenue to enable the railroads to operate efficiently and profitably, and in Finding 5, that the intrastate rates, increased to like extent as interstate rates, will increase the railroads' revenue and constitute not more than a fair proportion of the railroads' total income. There is no reference to any evidence supporting these findings. The findings are similar to those made by the Commission in *Alabama Intrastate Fares,* 258 I.C.C. 133. This type of finding was condemned on appeal by this Court in the North Carolina case, as being insufficient when unsupported by evidence.

The District Court in its opinion of July 24, 1952 said,

> "Before concluding we wish to add to the comments previously made with respect to the apparent insufficiency of the findings that we have noted that in its formal finding No. 4, the Commission stated that the Montana intrastate rates and charges 'are not contributing their fair share to the revenues required by respondents to enable them to render adequate and efficient service and to operate profitably.' This is precisely the conclusion reached by the Commission in the North Carolina case and is in large part in precisely the same language quoted by the Supreme Court at page 514 of 325 U. S., but this general conclusion of the Commission leaves us in the same predicament in which the Supreme Court found itself in that case. As the Supreme Court there said:

" 'This conclusion of the Commission, if based on findings supported by evidence, would justify its order.'

"The difficulty there was the same as our difficulty here, which is that so far we have been unable to discover such findings."

And in its opinion of August 13, 1952, the court said,

"We think that counsel is attempting to sustain the order by what the Supreme Court called in the North Carolina Case 'a very simplified form of proof.' "

The findings are apparently based on the reasoning that the interstate rates having been increased, in order to prevent violations of the Interstate Commerce Act, the Commission must apply the same increases to intrastate rates. So far as the matters involved in this case are concerned this would mean that there could be no disparity between the rates. *Such a conclusion is directly contrary to law.*

See:

North Carolina vs. *United States,* supra.

Illinois Commerce Commission vs. *Thompson,* 318 U. S. 675.

Florida vs. *United States,* 282 U. S. 194.

Wisconsin Railroad Commission vs. *Chicago, B. & Q. Ry. Co.,* supra.

Prior rate comparisons would, of course, be admissible in evidence, but they are not the criterion or basis on which the Commission may supplant state-made rates. The prior relationship may have been proper and reasonable. The requested rates may not be above the maximum reasonable rate. Neither of these conditions, under the provision of the act or under these controlling decisions, justify the Interstate Commerce Commission in supplanting state rates on these grounds. The present relationships may still be proper and the rates still be reasonable. The Com-

mission's statements relating to rate comparisons give emphasis to our contention that the findings are based on the mere existence of disparity in rates, which is not a sufficient ground. The Commission must find that the present state rates violate the Interstate Commerce Act and those findings must be based on proper evidence, not mere generalities, nor on a showing that the relationship in rates is not the same now as it was four years ago. The fact that the Interstate Commerce Commission, on the evidence before it, saw fit to increase interstate rates is not evidence that the present state rates violate any provision of the Act. *To so find would be to hold that the Commission has full authority over state rates and the states have no authority except to grant administrative approval.* Such a contention is contrary to the provisions of the Act.

Nor may the savings clause in the Commission Report take the place of the missing findings. The savings clause is intended to protect against those instances when rates otherwise properly ordered fail to fall within the general legality of the order. In other words, when the order as a whole is based on adequate findings, the savings clause will protect the isolated instances of error which might exist. This was recognized by the District Court in its opinion of August 13, 1952, relying on the Supreme Court's decision in *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563. In that case, the Supreme Court said,

> "But the order is not so restricted. It includes fares between all interior points although neither may be near the border and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or reason of the order. *In such a*

case, the saving clause by which exceptions are permitted, cannot give the order validity. As said by this court in the Illinois Central R. R. case, 'it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty.' See also American Express Co. v. Caldwell, 244 U. S. 617, 627." (Emphasis supplied.)

The validity of the Commission's Report and Order of necessity is required to stand alone. *The saving clause cannot give it validity,* merely because someone complaining about the order might be able to obtain relief. *If the order is not within the limits of the Commission's statutory authority, it cannot be enforced.*

The Commission's Authority Over Interstate Rates Has Been Erroneously Extended to Intrastate Rates

As this Court pointed out in the North Carolina case, supra, the Commission has broad powers over interstate commerce. We have previously stated the limitations applicable to the Commission authority over intrastate rates. In connection with interstate rates, the Commission determines whether they are reasonable. They do not have such authority over intrastate rates. Only when the intrastate rate causes either one or both of the conditions referred to in Section 13 may the Commission fix state rates. An intrastate rate higher than the maximum reasonable rate cannot be ordered, but the Commission's authority is not to fix reasonable state rates. *It can only remove the preference, prejudice or discrimination adversely affecting interstate commerce.*

Sections 1, 13 and 15a (49 U. S. C. 1, 13, 15a) of the Act were re-enacted in 1940 at the same time and in the

same act as the National Transportation Policy was declared. Section 1 (2) (a) provides that the Act,

> "shall not apply (a) To the transportation of passengers or property or to the receiving, delivering, storage, or handling of property, wholly within one state and not shipped to or from a foreign country from or to any place in the United States as aforesaid."

Section 15a (2), amended in 1933, states:

> "In the exercise of its power to prescribe just and reasonable rates, the Commission shall * * *"

The Commission has no jurisdiction over the reasonableness of intrastate rates. The quoted sections do not indicate any jurisdiction or implied jurisdiction over intrastate rates. Sections 13 (3) and 13 (4), supra, were added by the Transportation Act of 1920. Section 13 (4) grants authority to the Commission to increase intrastate rates (within the limits of the "zone of reasonableness") for the purpose of removing specified interference with interstate commerce. This Court in the North Carolina case held that before state rates may be increased by the Commission, the existence of one or both of the limitations in Section 13 (4) must be found to exist by specific findings supported by adequate evidence.

See also: *Florida* vs. *United States*, 282 U. S. 194.

The National Transportation Policy enacted in 1940 (Note preceeding 49 U. S. C. 1) lays down some general rules to be followed by the Commission. It does not propose to grant any additional jurisdiction to the Commission. Had Congress intended to change the interpretation placed on Section 13 (4) by this Court in the Florida case, supra, it could have done so by specific amendment in several different manners. Congress did not do so. We

think this Court correctly stated the boundaries of the Commission authority over state rates in the North Carolina case.

The Commission has apparently assumed that having acted on interstate rates under Section 15a that they have the same authority as to intrastate rates. In other words, they are deciding Section 13 cases on the same basis as they do interstate cases. Congress has never granted such authority and this Court has said the Commission does not have such authority. *An order supplanting state-made rates must be based on "clear findings supported by evidence of each element essential to the exercise of that power by the Commission."*

North Carolina vs. *United States,* supra.
Florida vs. *United States,* 282 U. S. 194.

The District Court opinion and finding that there is insufficient evidence to sustain the Court's finding of revenue discrimination under Section 13 (4) is in accord with the provisions of the statute and applicable decisions of this Court. There is no substantial question involving revenue discrimination against interstate commerce.

Conclusion

We respectfully submit that the decision of the District Court that there is no evidence or finding in the record sufficient to sustain a finding by the Commission that the present level of Montana rates (1) cause preference or prejudice against persons or localities, or (2) revenue discrimination against interstate commerce is based on and in accord with the provisions of applicable statutes and controlling decisions of this court. The questions presented have been so firmly established and settled by decisions of the court as to no longer be substantial ques-

tions. The motion to affirm the decision of the District Court appealed from should be granted.

Dated October 28, 1952.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

Docket No. 455

NORTHERN PACIFIC RAILWAY COMPANY, ET AL.,
Appellants,

vs.

STATE OF MONTANA, ET AL.,
Appellees.

REPLY TO MOTION TO AFFIRM

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REPLY TO MOTION TO AFFIRM

Appellants submit the following reply to the Motion to Affirm:

I.

The first contention made in the motion is headed "Evidence, Reports and Orders in General Increase Cases are not Adequate to Support an Order under Section 13 (4) Increasing State Rates."

The arguments made under this heading are all beside the point.

The order set aside by the Court below is not grounded on the evidence, reports and orders in the general increase cases.

The evidence in none of the general increase cases was introduced in Docket 30674 and such evidence was not before the Commission when it made the report and findings in support of the order here set aside. The Commission did

not comment, in docket 30674, on the evidence in the general increase cases. On the other hand, there is ample specific evidence in Docket 30674 concerning Montana intrastate traffic, operating conditions, economic conditions and other matters, which fully justifies the detailed findings which are made concerning Montana intrastate traffic and Montana economic conditions and operations, both interstate and intrastate.

Moreover, the District Court did not undertake to set aside the order on the basis that "evidence, reports and orders in general increase cases are not adequate to support an order under Section 13 (4) increasing state rates". The fact that appellants requested the Commission to institute the investigation in Docket 30674 indicates that they are not disputing, and have not disputed, the contention that the general increase proceedings are insufficient to support an order increasing Montana state rates.

The Commission's reports and orders in the general rate increase proceedings are, however, pertinent to the issues before the Commission in Docket 30674. The increases authorized in *Ex Partes No. 162, 166* and *168* were permitted pursuant to the rule of rate-making set forth in Section 15 a(2) of the Interstate Commerce Act, and in the light of the National Transportation Policy. These sections in brief impose upon the Commission the affirmative obligation of fixing interstate rates which will enable the railroads to perform adequate and efficient railway service. In *Wisconsin Railroad Commission v. C. B. & Q. R. R. Co.*, 257 U. S. 563, the Court, after stating that unless intrastate commerce contributes its fair proportion to the revenue needs of the railroads, interstate commerce may be required to assume the

deficiency through high interstate rates, said at page 586:

> "*** it is impossible to escape the *dovetail relation* between that provision [§ 13 (4)] and the purpose of § 15a. *If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity* by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce', within the ordinary meaning of those words." (Emphasis supplied.)

Though the *Wisconsin Railroad Commission* decision antedated the 1933 amendment to Section 15a, which eliminated provisions for the recapture of excess income and made other revisions in that section, it has since been held that the amendment did not in any way diminish the Commission's power or duty to increase intrastate rates which unjustly discriminate against interstate commerce. In *Florida v. United States,* 292 U. S. 1, the Court rejected the view that the 1933 amendment effected a "radical change" in the "dovetail relation" described in the *Wisconsin Railroad Commission* case (292 U. S. at pp. 5 and 6) and said further, at pp. 7-8:

> "On the contrary, the substituted rule of rate making by its express terms emphasizes the carriers' need of adequate revenues. The Congress had provided authority to meet that need where inadequate intrastate rates caused unjust discrimination against interstate commerce. The Commission had exercised that authority. The Commission had not proposed the diminution of that authority. The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It was rather designed to aid that control in the light of the depressed economic condition of the railways. We conclude that

the new rule of rate making left the power of the Commission under § 13 (4) intact."

There is nothing in footnote 4 in *North Carolina v. United States*, 325 U. S. 507, referred to by appellees, which is inconsistent with this specific holding in *Florida v. United States.*

In the instant case, as we pointed out in our Jurisdictional Statement, the District Court grossly misinterpreted the Commission's reports and orders in *Ex Parte 168* as effecting an unlawful subsidy of intrastate traffic at the expense of the interstate commerce of the nation. And because of its misreading of *Ex Parte 168* the District Court set aside the Commission's order in Docket 30674 for the apparent reason that the Commission did not in the latter proceeding either (1) reiterate that increases authorized in interstate rates in *Ex Parte 168* would meet merely the railroads' increased costs insofar as attributable to the handling of the traffic to which the rates applied, i.e., interstate traffic, or (2) determine with exactitude the amount of revenue continuously required from Montana intrastate transportation to enable the railroads affected, in view of the supposed subsidy from interstate commerce, to operate efficiently. As we there pointed out, the complete and adequate findings of the Commission with respect to Montana intrastate traffic, Montana economic conditions, the financial condition of the Montana lines and with respect to Montana intrastate operations require the intrastate rates to be increased as ordered to remove unjust discrimination against interstate commerce, particularly when the reports in *Ex Parte Nos. 162, 166* and *168* are read in their natural sense and according to their plain meaning.

II.

The second contention of appellees is entitled "The Finding of the Court That the Record Does Not Disclose Preference or Prejudice of Interstate or Intrastate Shippers to Justify the Commission Order Is In Accordance With the Law." Under this heading appellees purport to discuss the evidence before the Commission on the issue of preference and prejudice between shippers.

But the District Court did not examine the evidence before the Commission and has not based its decision on such evidence. The court's examination of the "record" before the Commission has been limited to the Commission's report and order. While it discusses the "instances of preference and prejudice listed in the present report and order," 106 F. Supp. 791, it categorically refuses "to delve into the record and go behind the Commission's findings." Quoting *Florida v. United States*, 282 U. S. 194, 215, the court below says:

> "'*** we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body ***.'" 106 F. Supp. 792.

And the court holds, simply, that the Commission's "findings as to preference and prejudice as between persons and localities," as distinguished from the evidence before the Commission, "will not sustain the general order now before us."

Without here attempting a reply to appellees' discussion of the evidence, we point out that the explicit statements in the Commission's report, which reviews that evidence, contain more than a mere recitation of rate disparities. Movements made, movements not made because of rate relation-

ships, competition between shippers and between localities, absorption of price differentials by competing shippers, and many other matters are covered in the Commission's report in minute detail. In view of the voluminous record, the Commission's careful recitation of the facts and its sharp findings on this issue, which satisfy the statute and the law, the District Court, which itself refused to look into the evidence before the Commission, should not have interfered in the administrative field. In appraising a Commission report and order in a similar situation, it was said in *State of Texas v. United States*, 84 F. Supp. 791, affirmed *per curiam* 337 U. S. 911:

> "To paraphrase Mr. Justice Douglas, in Ayrshire Collieries Corp. v. United States, supra [335 U. S. 573, 593], it is not within the competence of our limited function in this field to undertake to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. The problems presented are essentially for the administrative ratemaker as long as no statutory requirement is overlooked." (84 F. Supp. 794)

III.

The third heading in appellees' Motion to Affirm is entitled "The Findings of the Court That the Record Does Not Disclose Facts or Findings Sufficient to Prove Revenue Discrimination Is In Accordance With the Law." Appellees here misstate the extent of the court's holding. Nowhere does the court below discuss the "facts" except as they are reflected in statements or findings in the Commission's report. The Court's examination of the "record" was limited to its reading of Commission reports and orders, as distin-

guished from the testimony and exhibits in docket 30674. Its holding on the issue of revenue discrimination, as well as its holding on the issue of undue preference and prejudice between persons and localities, is limited definitely and entirely to an asserted deficiency in the findings. 106 F. Supp. 793.

Appellees here assert that "there is nothing in this record whereby any [interstate] rate may be determined to be reasonable." The Commission in docket 30674, at 284 I. C. C. p. 204, made a specific finding (No. 2) that the interstate rates are reasonable, and the District Court does not dispute that finding. This Court may not, therefore, assume that the finding was not justified by specific evidence of record in docket 30674, nor may it accept appellees' unsupported statement that "sole reliance is placed on the findings in the general increase cases."

It was not necessary in this situation that the Commission also find, as a prerequisite to an order raising intrastate rates for the purpose of removing unjust discrimination against interstate commerce, that the Montana intrastate rates are either less than compensatory or below a minimum reasonable level. While this Court in *Florida v. United States*, 292 U. S. 1, 9, noted, incidentally, that the Commission had found that the intrastate log rates there involved were abnormally low and less than reasonably compensatory, the Court did not there hold that such a finding was essential to the validity of the Commission's order. Ever since *Transcontinental Cases of 1922*, 74 I. C. C. 48, the Commission has considered that under certain circumstances carriers may maintain rates which return less than their ratable proportion of the average cost of freight traffic generally, including taxes and a return on investment, and still be above a reason-

able minimum level. See *Petroleum From South Atlantic Ports to Southeast,* 245 I. C. C. 23; *All Freight Ports to the South,* 251 I. C. C. 361. Nevertheless, if all, or a substantial portion, of the traffic of the railroads were carried at such low rates most railroads would be in bankruptcy. Therefore, it is easily possible for a given rate to be above a minimum reasonable level by such standards and, where it is an intrastate rate which has not been increased proportionately with interstate rates for the handling of like traffic under comparable circumstances, to operate as a real discrimination against interstate commerce. The Commission, acting under section 13(4), may direct such intrastate rate to be raised to a level which will remove the discrimination so long as the rate does not thereby become unreasonably high. *United States v. Louisiana,* 290 U. S. 70. The increases in intrastate rates here ordered to be maintained are those which are and for the future may be maintained on like interstate traffic under Ex Parte Nos. 162, 166 and 168 (Finding No. 7). In the case last cited the Court said at page 82:

> "The fact that the order of the Commission for the increase of interstate rates was permissive only does not affect the validity of its order prescribing minimum intrastate rates. The interstate rates after the addition of the authorized surcharges were lawful rates in interstate commerce, which was discriminated against by the failure to make corresponding increases in intrastate rates. This discrimination the Commission removed in the manner authorized by § 13 (4), by prescribing minimum intrastate rates at the same level as the interstate rates."

As indicated in our Statement as to Jurisdiction, *United States v. Louisiana* was cited with approval in *North Carolina v. United States,* 325 U. S. 507, 520.

Throughout the Motion to Affirm the argument is reiterated from time to time that the Interstate Commerce Commission and these appellants have taken the position that there can be no disparity between interstate and intrastate rates, that the hearings under Section 13 (4), such as the one held in docket 30674, are mere formalities, and that in every case where state authorities have refused to grant increases corresponding to those authorized in the general rate increase cases, such refusal requires that the Interstate Commerce Commission step into the breach and order an elevation of state rates to the same extent as interstate rates have been increased. Appellees are not correct.

If the order the Commission made in docket 30674 ultimately becomes effective on Montana intrastate traffic, there will still be, in a number of instances, a disparity between intrastate and interstate charges on like traffic for comparable movements. The disparity will exist because, with respect to a substantial number of commodities, the intrastate rates basically, without regard to the *Ex Parte 162, 166* and *168* increases, are lower than those for corresponding interstate movements, and the mere addition of corresponding increases on both types of traffic will not produce uniformity. Intrastate class rates within Montana, the rates on livestock, farm crops, feeds, logs and lumber and various less-carload rates (to cite examples of some Montana state rates which are basically below the interstate level) are among those which will still be below the interstate level if the Commission's order in docket 30674 becomes effective. Moreover, the hearing held in docket 30674 has served the purpose contemplated by Sections 13 (3) and 13 (4) of permitting the Commission to ascertain whether or not interstate and Montana intrastate operating conditions are comparable,

whether Montana intrastate traffic and intrastate shippers and receivers are able to bear the increases sought in intrastate rates, whether Montana intrastate rates are unreasonably high in any instance, whether the increases sought will bring such rates above a reasonable level in any case, whether such increases will actually produce additional revenue to the railroads in view of motor carrier and other competition, and whether the Montana railroads are in need of additional revenue from Montana state traffic to perform adequate and efficient transportation, both state and interstate. The Commission's detailed and careful findings on these matters have been summarized in our Jurisdictional Statement. It is not without significance that the Commission here went into sufficient detail to except from its findings and the operation of its order in docket 30674 the joint-line rates on horses, 284 I. C. C. 204, and that in similar recent proceedings involving intrastate rate adjustments in other states the Commission has not hesitated, where the evidence required, to make exceptions from the operation of various other thirteenth section orders which it concluded would be proper. See for example: *Iowa Intrastate Rates and Charges,* 284 I. C. C. 225 (where intrastate rates on sugar beets were excepted); *Increases in Florida Intrastate Rates,* 278 I. C. C. 41 (where non-transit rates on sugar cane, certain rates on wastewood, pulpwood and fertilizers and fertilizer materials were all excepted); *Increases in Arizona Freight Rates and Charges* 270 I. C. C. 105 (where intrastate rates on raw products of agriculture and on sulphuric acid were excepted); and *Increases in Alabama Freight Rates and Charges,* 274 I. C. C. 439 (where certain rates on pulpwood were excepted). The Commission's order in *Increases in Florida Intrastate Rates, supra,* is presently before this Court in *King v. United States,* October Term, 1952, No. 9, submitted last month.

The grave responsibility upon the Commission of fixing freight rates adequate, under Section 15a (2) and the National Transportation Policy, to enable the rail carriers to perform efficient transportation service adequate to meet the needs of the commerce of the Nation and of the national defense has been particularly acute during the period of post-war inflation. The Commission's problems are recurring ones. The District Court's action in enjoining the Commission's order in this carefully considered proceeding has operated so as to defeat the Commission's exercise of the Congressional mandate in respect of a substantial portion of the commerce of the United States. The precedent, if sustained, would be far reaching. We reiterate our belief that the questions presented by this appeal are substantial and of public importance.

Dated at St. Paul, Minnesota, this 14th day of November, 1952.

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Office - Supreme Court,
FILED
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HAROLD B. WILLEY, C

Supreme Court of the United States

OCTOBER TERM, 1952

No. 455

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, ET AL., *Appellants,*

vs.

STATE OF MONTANA, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, ET AL., *Appellees.*

PETITION FOR REHEARING

ARNOLD H. OLSEN,
Attorney General of the State of Montana;

H. M. BRICKETT,
Assistant Attorney General of the State of Montana;

EDWIN S. BOOTH,
Secretary-Counsel of the Board of Railroad Commissioners of the State of Montana and Special Assistant Attorney General of the State of Montana,

Counsel for Appellees.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 455

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vs.

STATE OF MONTANA, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, ET AL., *Appellees.*

PETITION FOR REHEARING

The above named appellees, the State of Montana, Board of Railroad Commissioners of the State of Montana and the individual members of said Board, present this, their petition for reconsideration and rehearing of the above entitled cause, disposed of by order delivered December 22, 1952, wherein the judgment is vacated and the case remanded to the District Court for further proceedings in light of *King vs. United States,* No. 9, October Term 1952, decided December 22, 1952. In support of their petition, appellees respectfully show:

I.
Preliminary Statement

Both the King Case and this Case arise by reason of the respective State Commissions of Georgia and Montana refusing to grant identical increases intrastate as were granted interstate in some of the Ex Parte general increase cases occurring since 1946. The actions were brought under Sec. 13 (3) and 13 (4) of the Interstate Commerce Act. In the King Case, the State of Florida argued that passenger deficits should not be considered in determining the right of the Interstate Commerce Commission to increase intrastate freight rates. The Court's discussion of this matter and its decision against the state contention is found on pages 5 to 12 of the advance printed opinion. No similar contention has been made in the instant case and we may therefore disregard that point so far as the present case is concerned.

Section 13 (4) of the Interstate Commerce Act provides two conditions when the Federal Commission may order state rates increased. The first of these conditions is when the intrastate rate results in "undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate commerce on the other hand." In considering this phase of Section 13 (4) of the Act, the Lower Court in the King Case expressed doubt as to the ability of the Commission to sustain its action on that ground and this Court placed no reliance upon the undue preference and prejudice feature in its opinion (Footnote 14, page 15 of advance opinion King Case). The Court in the Montana case held that the record did not support the finding of the Commission as to prejudice and preference. Because of the action in the King Case we assume no direction relative to findings of prejudice and preference against persons or localities is contained in the order remanding the case and we will not discuss this feature further.

II.

The Remanding of This Case for Further Proceedings in Light of the King Case, Considering the Decision of the District Court, Is Erroneous.

The order remanding this case for further proceedings in light of King vs. United States is apparently related solely to the second condition when the Interstate Commerce Commission may order state rates increased under Section 13 (4) of the Act. This condition, when state rates may be ordered increased, is where the state-made rate causes "any undue, unreasonable or unjust distrimination against interstate or foreign commerce." The Court's discussion of this condition is found on pages 13 to 21 of the advance opinion. On page 14, the Court said:

> "The Commission there finds that the maintenance of the existing intrastate rates within Florida 'on bases lower than those herein approved causes and in the future will cause, (1) in all instances, unjust discrimination against interstate commerce . . . .' 278 I. C. C. at 73. *If supported by adequate subsidiary findings, this ultimate finding thus sustains the authority of the Commission and the validity of its order.* North Carolina v. United States, 325 U. S. 507, 514; Florida v. United States, 292 U. S. 1; 282 U. S. 194; United States v. Louisiana, 290 U. S. 70). The court below adds that it is 'clear from the evidence in the case that it (the existing intrastate rate) did result in undue, unreasonable and unjust discrimination against interstate commerce . . . .'" 101 F. Supp. 941, 945. (Emphasis supplied)

It is noted that the Lower Court in the Florida Case found the evidence adequate to show discrimination. The Montana District Court, relying on North Carolina vs. United States, 325 U. S. 507, found that the evidence was insufficient to justify the order of the Commission. The statement from the North Carolina Case, supra, relied on and referred to is as follows:

"The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission." (Emphasis supplied)

A study of the two opinions by the Montana District Court, 106 Fed. Supp. 778 and 786, shows that it fully considered the evidence. In its opinion of August 13, 1952, the Court said:

"The third argument made on behalf of the intervening Railroad defendants throws even further doubt upon the sufficiency of the Commission's findings. That argument is that the finding which our former opinion declared missing was wholly unnecessary. It was contended that since the Commission in Ex Parte 168 and in the proceeding here under review found that the Railroads here affected required additional revenues at the time the application in Ex Parte 168 was presented, and since it found that the Montana intrastate rates are now on a lower level that the interstate rates now found reasonable, the fact that both kinds of traffic moved under the same conditions, with costs inextricably commingled, requires a conclusion that the intrastate rates may be properly ordered brought in line with the interstate rates. Counsel who made this contention on behalf of the Railroads summarized his argument as follows: 'I think it is clear from what I have said earlier that in view of the woefully inadequate revenues of the Montana lines, the low level of Montana intrastate rates, the fact that operating conditions are the same, that a contribution of no greater percent from Montana intrastate traffic is not in excess of the amount needed by these lines to enable them to operate adequately and efficiently.'

"We find ourselves unable to go along with this argument. It appears to us to be an attempt to contend that the mere existence of a disparity between intrastate and interstate rates is sufficient to warrant the Com-

mission to prescribe intrastate rates. We think it sufficiently settled that 'the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates.' Florida v. United States, 282 U. S. 194, 211-212; North Carolina v. United States, 325 U. S. 507, 516. We think that counsel is attempting to sustain the order by what the Supreme Court called in the North Carolina case 'a very simplified form of proof.'

"Here there is no finding as in Florida v. United States, 292 U. S. 1, 9, that the intrastate rate scale 'was abnormally low and less than reasonably compensatory . . . . insufficient under all circumstances and conditions to cover the full cost of the service.' There is nothing in the record before us to disclose a finding that the increased interstate rates and the existing intrastate rates are not both within a 'zone of reasonableness'. (the term is from U. S. v. Chicago, M., St. P. & P. R. Co., 294 U. S. at p. 506).

"But the very fact that this argument thus rejected by us has been made here, suggests the possibility that the Commission accepted and acted upon a similar view. When that is considered there is brought to mind a special and peculiar reason why 'a high standard of certainty' must be required of findings in a case of this character. For, as stated by Mr. Justice Cardozo in U. S. v. Chicago, M., St. P. & P. R. Co., supra, at page 511, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong'. And as stated by Mr. Justice Douglas in U. S. v. Carolina Carriers Corp., 315 U. S. 475, 489, 'An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain.' "

The Lower Court likewise pointed out that Section 8b of the Administrative Procedure Act (5 U. S. C. 1007b) requires that all decisions of the Commission must "include a statement of (1) findings and conclusions, as well as the

reasons or basis therefore upon all the material issues of fact, laws or discretion present on the record."

The King Case discusses the Commission findings in the Florida Case which are similar to those contained in the Report of the Commission in the Montana Case. (284 I. C. C. 167). The Court then said that "no question has been raised as to the adequacy of the evidence upon which any of the findings are based" (page 18). If there was evidence in the Montana Case to support the findings that Montana intrastate rates were unjustly or unduly discriminatory against interstate commerce this case would not be before this Court. Evidence to support the findings has been found lacking by the District Court. Under these conditions, the case should not be remanded for proceedings in conformity with a case divided on the basis of a special question not here present (passenger deficits) and on adequacy of findings only.

The Court, on page 18 of its opinion in the King Case, quotes from Illinois Commerce Commission v. United States, 292 U. S. 474, as support for the fact that evidence in a case under Section 15 (a) should likewise be applicable in a case under Section 13 (4). That case involved an investigation under both sections of the Act. (177 I. C. C. 669; 195 I. C. C. 89) and related to service in a small area. This case was distinguished by this Court in its footnote No. 5 in North Carolina vs. United States, supra.

We have previously discussed the inadequacy of the evidence and findings in Montana case in our Motion to Affirm. We ask the Court to again review the statements therein made, particularly pages 6 to 12 and 18 to 29 of the printed motion.

III.

The Decision in the Instant Case Is in Harmony with Controlling Decision and the Motion to Affirm Should Be Granted or in the Alternative the Case Should Be Placed on the Docket for Oral Argument.

Our reading of the Court Opinion in the King Case indicates that the evidentiary requirements in the North Carolina Case to support the findings is approved and is still the controlling decision.

In its opinion of July 24, 1952, the Montana District Court said:

> "We are well informed by the Commission's order itself that it thinks these increases 'ought to be made'. But as stated in the North Carolina case, they cannot be made unless the Commission by appropriate findings *based on evidence* states *why* they ought to be made." (Emphasis supplied)

Thus the question raised is not merely one of findings which were discussed in the King Case but one of the inadequacy of evidence. If the evidentiary requirements of the North Carolina Case are still required (and they appear to be approved in the King Case) then the judgment of the Montana District Court should be affirmed, or in the alternative the case should be placed on the docket for argument.

If on the other hand, the Court intends to approve the action of the Interstate Commerce Commission in raising intrastate rates solely on the basis of the Commission's actions and authority over interstate rates under Section 15 (a) of the Act and to set aside the rules pronounced in the North Carolina Case, it results in virtual overruling of the North Carolina case and effects amendment of Section 13 (4) of the Act as expressed by Congress and interpreted by the decision in that case. Such a drastic action should only be presumed when specifically stated. However, we are confident that the latter interpretation is the one which will be

urged by the Commission and by the railroads. Action by this Court on the Montana Case rather than remanding it under the conditions existing will prevent unnecessary confusion as to the possible conflict between the North Carolina Case and the recently decided King Case.

We believe Section 13 (4) of the Interstate Commerce Act is clear in its purpose and limitations and was correctly interpreted in the North Carolina Case and reaffirmed as to principle in the King Case. However, the King Case discusses primarily the adequacy of findings and not of evidence. From a reading of the Commission Report involved in the case (278 I. C. C. 41) and the Court opinion, there may well be doubt as to the evidence now required in a Section 13 case. This doubt should be removed at the first opportunity, in order to avoid confusion for the Interstate Commerce Commission, the state regulatory agencies, the railroads, the shippers and even Congress.

The Montana case specifically raises the question of adequacy of the evidence to support the findings. There is no evidence other than system financial figures, disparity of rates and a mathematical computation, based on an estimate as to the additional revenue which would be derived if the rates were increased, to support the findings of the Commission. While the evidence is that the increased rates would not exceed reasonable maximum rates, it is also shown that none of the rates are below minimum reasonable rates. There is no finding that the rates are abnormally low. The authority of the Interstate Commerce Commission is to remove "undue, unreasonable or unjust discrimination." Evidence in the record does not establish such forbidden discrimination. The Commission does not have authority to fix intrastate rates for any other reason, regardless of what may be considered a reasonable interstate rate. As we said before, if the evidence supported the findings, this case

would not be here. We refer to pages 6-12 of our printed Motion to Affirm and ask the Court to again consider the matters there stated.

Conclusion

We most respectfully submit that this petition for rehearing be granted; that the order vacating the judgment and remanding the case to the District Court for further proceeding in light of King v. United States, No. 9, October Term 1952, be withdrawn; that the judgment of the Lower Court be affirmed, or in the alternative that the case be placed on the docket for oral argument; and that in the meantime no mandate be issued by this Court.

ARNOLD H. OLSEN,
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H. M. BRICKETT,
Assistant Attorney General of the State of Montana

EDWIN S. BOOTH,
Secretary-Counsel for the Board of Railroad Commissions of the State of Montana and Special Assistant Attorney General of the State of Montana

Counsel for Appellees.

CERTIFICATE OF COUNSEL

I, Edwin S. Booth, of counsel for the above-named appellees, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Dated December 31, 1952.

EDWIN S. BOOTH, *of Counsel*

83

Supreme Court, U.S.
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JAN 12 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

DOCKET No. 455

NORTHERN PACIFIC RAILWAY COMPANY, Et. Al,
Appellants,

vs.

STATE OF MONTANA, Et Al.,
Appellees.

APPELLANTS' REPLY TO PETITION FOR REHEARING

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Appellees.

APPELLANTS' REPLY TO PETITION FOR REHEARING

Except for complete reversal and direction of entry of judgment in the district court in favor of defendants, the Court's order of December 22, 1952 is the only appropriate disposition of this appeal. Without opinion, the Court has ordered the district court's judgment vacated and has remanded this case for further proceedings in the light of its opinion in *King vs. United States* (No. 9, October term, 1952) decided the same day. The Court's action is clearly compelled by its contemporaneous decision in the *King Case.*

Appellees seek rehearing because of an asserted dissimilarity in the controlling issues in the two cases. In reality there is no dissimiliarity. The petition should therefore be denied.

There were but two issues on which the Court decided the *King Case*. One of those, involving the Interstate Commerce Commission's consideration of passenger deficits in prescribing intrastate freight rates under section 13 (4), is not pertinent here. The other issue was the sufficiency of the Commission's findings to support its thirteenth section order prescribing Florida intrastate freight rates to remove unjust discrimination against interstate commerce (Slip Op., pp. 13-21). The Court held such findings sufficient and sustained the Commission's order.

The Commission's thirteenth section order in the instant case prescribing Montana intrastate freight rates rests upon findings similar to those considered in the *King Case*. Appellees frankly concede that the findings here involved and the findings reviewed in the *King Case* are substantially the same. In the petition for rehearing it is said at page 6:

> "The King Case discusses the Commission's findings in the Florida Case *which are similar to those contained in the Report of the Commission in the Montana Case.*" (Emphasis supplied.)

However, in the *King Case* such findings were held sufficient and in the instant case the court below held them insufficient. Summarizing its conclusions in the last two sentences of its second opinion dated August 13, 1952, 106 F. Supp, at p. 793 (Statement as to Jurisdiction pp. 101-102), the district court said:

> "Accordingly, for the reasons and on the grounds stated, both in this and in our former opinion, both of which are hereby adopted as the findings of this Court, *we hold and conclude that the order here reviewed is not supported by the necessary findings of the Commission* and that the same is void and in excess of the powers of the Commission. A permanent injunction will issue accordingly." (Emphasis ours.)

The contrary conclusion in the *King Case* requires vacation of the judgment below.

Appellees would have this Court believe that the district court not only based its decision on what it conceived to be an inadequacy of the Commission's findings but also on a determination of the sufficiency of the evidence before the Commission. But this contention necessarily fails because appellees cannot point to any statement of the district court which indicates that the evidence before the Commission was either considered by the court or determined not to be adequate. In fact the district court said at 106 F. Supp at p. 792 (Statement as to Jurisdiction, p. 100) that it had no obligation "to delve into the record and go behind the Commission's findings." Quoting from *Florida v. United States*, 282 U. S. 194, at p. 215, it said:

> "'* * * we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body * * *.'"

Appellees' petition for rehearing, which rests upon the premise that the district court did what it stated it was not called upon to do, is clearly without foundation.

It is respectfully submitted that the petition for rehearing should be denied.

Dated this 9th day of January, 1953.

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DECEMBER 22, 1952.

Per Curiam Decision.

No. 455. NORTHERN PACIFIC RAILWAY CO. ET AL. *v.* MONTANA ET AL. Appeal from the United States District Court for the District of Montana. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court for further proceedings in the light of *King* v. *United States, ante,* p. 254, decided this day. *Louis E. Torinus, Jr., Eldon M. Martin, Elmer B. Collins* and *Marcellus L. Countryman, Jr.* for appellants. *Arnold H. Olsen,* Attorney General of Montana, *H. M. Brickett,* Assistant Attorney General, and *Edwin S. Booth* for appellees. Reported below: 106 F. Supp. 778, 786.